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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1861

SOUTH GWINNETT VENTURE, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green,

Petitioner,

versus

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually and as Chief Building Inspector of Gwinnett County,

Respondents.

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership,

Petitioner,

versus

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually and as Chief Building Inspector of Gwinnett County,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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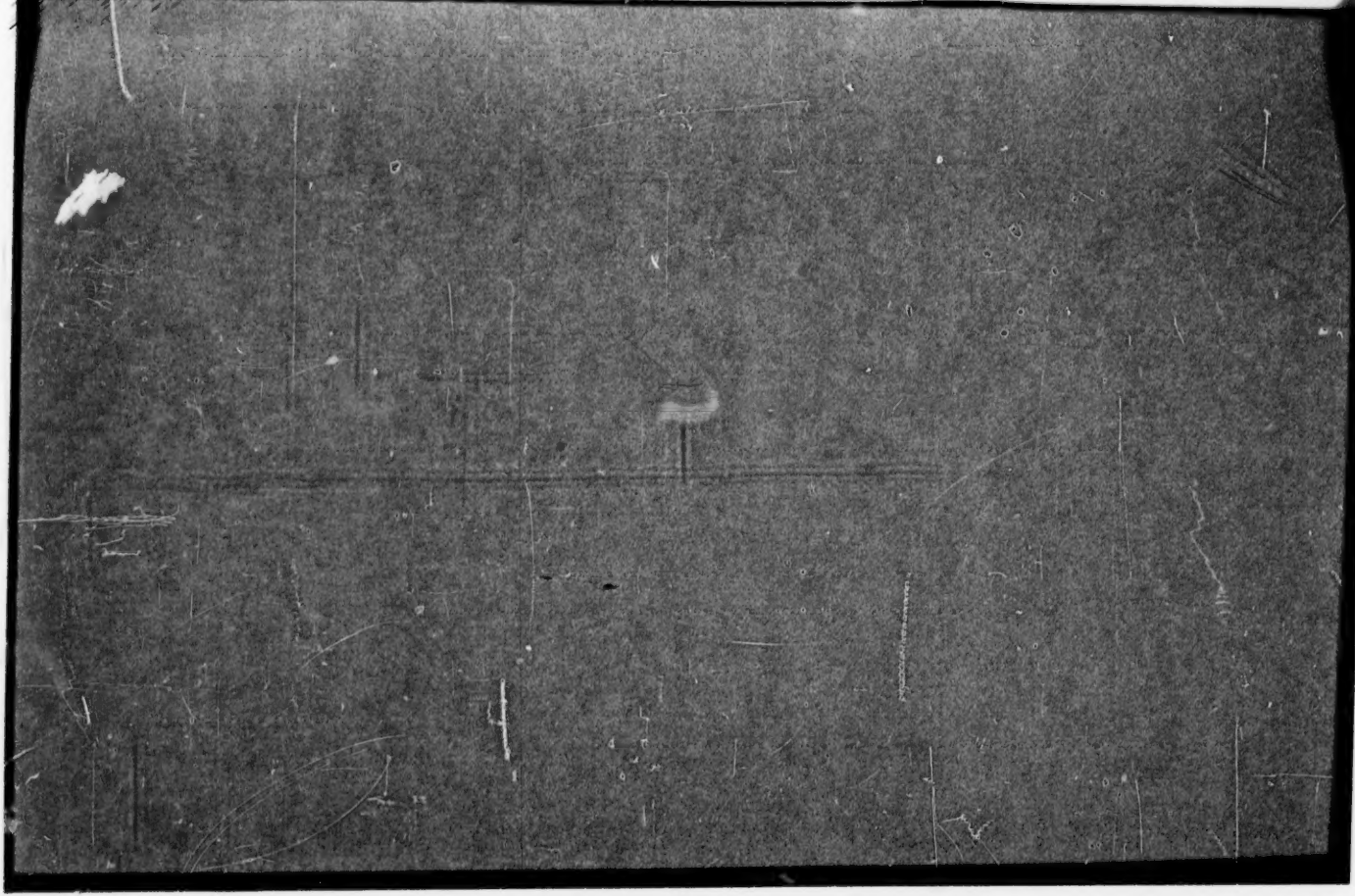

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The petitioners, South Gwinnett Venture, a partnership composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green, and Rockbridge Associates, Ltd., a Georgia Limited Partnership, respectfully pray that a writ of certiorari issue to review the

opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cases on March 14, 1974.

OPINIONS BELOW

The opinion of the United States District Court is reported in *Rockbridge Associates, Ltd. v. Pruitt*, 341 F. Supp. 703 (N.D. Ga. 1971). A copy of this opinion appears as Appendix A hereto. On appeal, the Court of Appeals for the Fifth Circuit, reversed and remanded in its opinion reported in *South Gwinnett Venture v. Pruitt*, 482 F.2d 389 (5th Cir. 1973). A copy of the opinion appears as Appendix B hereto. On December 3, 1973, the Court of Appeals for the Fifth Circuit, on its own motion, ordered a rehearing en banc; the memorandum order is reported in *South Gwinnett Venture v. Pruitt*, 487 F.2d 1333 (5th Cir. 1973). A copy of the said order appears as Appendix C hereto. On rehearing en banc, the Court of Appeals for the Fifth Circuit, per Judge Coleman, reversed its prior decision in the case and on March 14, 1974 affirmed the judgment of the District Court. Judge Wisdom and Judge Ingraham dissented and filed a separate opinion. The opinion of the Court of Appeals for the Fifth Circuit, on rehearing en banc, is reported in *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir. 1974). A copy of said opinion appears as Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 14, 1974.

Jurisdiction to issue the writ is invoked pursuant to the provisions of Title 28, United States Code § 1254(1), which provides in relevant part that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment.

QUESTIONS PRESENTED

1. Whether consideration of petitions for rezoning individual tracts of land on a case-by-case basis is an exercise of administrative discretion so inherently adjudicatory in nature that a zoning authority empowered to make such a decision should be constitutionally required to adhere to concepts of minimal due process.

2. Whether the Gwinnett County, Georgia Zoning Commission violated fundamental fairness and the minimal requirements of Due Process when

(a) it failed to prescribe standards by which petitioners' rezoning applications would be judged,

(b) it made extensive use of *ex parte* information to reach its decision without advising petitioners of what evidence was being considered, without allowing them to cross-examine witnesses or rebut or explain adverse testimony, and

(c) it failed to reveal any findings of fact to support its conclusion that petitioners' request must be denied.

3. Whether the protection of private property rights is an interest so deeply rooted in our social structure and fundamental to the stability of our society that the deprivation from an individual requires that full constitutional procedural due process be provided in adjudicatory zoning proceedings to ensure that the Commission's regulatory exercises of its police powers, which severely restrict a person's use of *his* property, comport with the Constitutional mandate that such controls be reasonably related to the public health, safety, welfare and morals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Georgia, Article III, Section VII, Paragraph XXII [Georgia Code § 2-1923], provides:

> "The General Assembly of the State shall have authority to grant the governing authorities of the municipalities and counties authority to pass zoning and planning laws whereby

> such cities or counties may be zoned or districted for various uses and other or different uses prohibited therein, and regulating the use for which said zones or districts may be set apart, and regulating the plans for development and improvements on real estate therein."

The "home rule" portion of the Constitution of Georgia [Georgia Code § 2-8402] is set forth in Appendix E.

The Zoning Ordinance of Gwinnett County, Georgia insofar as material here, appears as Appendix F hereto.

STATEMENT OF THE CASE

In these civil actions in Equity for declaratory and other appropriate relief based on allegedly unconstitutional proceedings conducted by the Zoning Commissioners and Building Inspector of Gwinnett County, Georgia, in violation of petitioners' Fourteenth Amendment rights, petitioners seek a Writ of Certioriari to the United States Court of Appeals for the Fifth Circuit to review the affirmation by that court of the dismissal of their suits by the District Court for the Northern District of Georgia, Atlanta Division.

ROCKBRIDGE ASSOCIATES, LTD.

This petitioner is a Georgia limited partnership and the owner of a modest tract of land in Gwinnett County, Georgia, located in the suburban region im-

mediately outside the City of Atlanta. One portion of petitioner's property is presently zoned R-85 (residential); the other is zoned C-2 (commercial). In June, 1970, Rockbridge Associates, Ltd. (hereinafter "Rockbridge") applied to the Gwinnett County Planning Commission to have the property rezoned to an R-M (apartment) classification. The Planning Commission, a body of land use experts specifically appointed to advise and assist the local authority in making planning and zoning determinations, held a hearing concerning the matter on July 2, 1970, and subsequently recommended approval of its request for rezoning.

On August 25, 1970, the Gwinnett County Board of Commissioners [respondents in this case] conducted a public hearing on the application at which time members of the community were urged to express their views concerning the proposition. Rockbridge presented its rezoning proposal together with the previously approved site development plan and other pertinent data. A delegation of persons from subdivisions near its property was present at the meeting and voiced opposition to the rezoning. At the close of the hearing, respondent Commissioner Gunnin moved to table decision on the matter for two weeks so that he could obtain additional studies and consult with the County Engineering Department. In the days following the hearing, the commissioners held *ex parte* conversations with numerous individuals opposed to the change, many of whom did not attend the public meeting, and received written objections from several other nonattenders. Presumably, respondent Gunnin and other commissioners consulted with the County Engineering and Water Departments to obtain information concerning sewage treatment, water availability, and

road conditions as well. However, the commissioners refused to disclose the content of the *ex parte* discussions and likewise which, if any, of the engineering data they considered determinative or relevant to their ruling on the requested rezoning.

The meeting to decide the question was held September 9, 1970. The respondents refused to follow the recommendation of the Planning Commission and denied the application for rezoning. The respondents in denying the application *concluded*, inter alia, there was insufficient water, inadequate sewage facilities, inadequate roads, and inadequate schools in the area, but *offered no proof whatsoever to support these conclusions.* Respondents further noted, somewhat paradoxically, that a large amount of R-M zoned land in the immediate area was *un*developed, and therefore, there was no need for additional R-M zoned property. Finally, and more candidly perhaps, respondents noted that the petitioners' tract of land was located between two residential areas and "would seriously affect them."

SOUTH GWINNETT VENTURE

This petitioner is also a partnership which owns a different tract of land in Gwinnett County, Georgia, located in the suburban region immediately outside Atlanta. In September, 1970, petitioner applied to the Gwinnett County Planning Commission to have the zoning classification changed from R-85 (residential) to R-M (apartment). The Planning Commission held a hearing concerning the matter on October 15, 1970, and subsequently recommended approval of the request for rezoning.

On November 24, 1970, the respondent Gwinnett County Commissioners conducted a public hearing on the application at which time members of the community voiced opposition to the plan for rezoning. At the close of the hearing, the recommendation of the Planning Commission was rejected and the application for rezoning was denied. Respondents listed insufficient water, inadequate sewage facilities, inadequate roads and schools, plus the observation that there was already a large amount of *un*developed R-M zoned land in the immediate area as its "reasons" for the decision. However, no evidence whatsoever was disclosed and no attempt whatsoever was made to substantiate any of these conclusory statements.

Petitioners raised the following objections to respondents' *procedure* in both cases:

(1) The criteria upon which these decisions were allegedly based were not promulgated in any county zoning ordinance, and to this day the standards which respondents used to reach the decisions are unknown to the public;

(2) The precise facts which the Commission relied on in reaching the decisions were not, and have never been disclosed to petitioners, who have never had an opportunity to rebut or explain presumably adverse information collected *ex parte* by the commission, or to cross-examine witnesses who may have supplied evidence in opposition to petitioners' request, and thus respondents' decision was not based on competent evidence establishing that the proposed rezoning was inconsistent with the objectives of the county resolution; and

(3) Therefore, the decision was arbitrary, capricious, and amounted to a taking of property without due process in that it *arbitrarily* interfered with the petitioners' rights in and use of its property, and *arbitrarily* deprived petitioners of a major portion of the value of their property.

Petitioners brought a civil suit in Equity for declaratory and other appropriate relief, alleging denial of due process and equal protection of the law under the Fourteenth Amendment. Jurisdiction was alleged under 28 U.S.C. § 1331(a), as a case arising under the Constitution of the United States.

Petitioners prayed for an order of the court declaring those portions of the Gwinnett County Zoning Ordinance and applicable zoning maps pertaining to their property be declared unconstitutional; they further prayed for an order of the court that respondent Herrington, in his official capacity as Chief Building Inspector of Gwinnett County, issue petitioners a building permit for the construction of apartments upon subject property.

The District Court for the Northern District of Georgia, Atlanta Division, took jurisdiction, but dismissed the suit holding that a decision of this nature by the local zoning authority is an exercise of judgment *legislative* in character, and thus beyond the control of judicial power. Petitioners appealed to the Court of Appeals for the Fifth Circuit which initially reversed the judgment of the District Court, holding, inter alia, that:

> "The adoption of a legislative plan for the entire community must be distinguished from

> the treatment which a specific tract of land receives when its owner petitions from reclassification under that plan * * * consideration of that petition is an exercise of legislative power in a case-by-case *adjudicative* setting." (emphasis added)

Having distinguished the adjudicative decision inherent in tract rezoning from the legislative action of adopting a comprehensive zoning plan, the court held that henceforth the zoning commission would be required to adhere to minimal concepts of due process when conducting *adjudicatory* zoning proceedings, citing a long line of precedents in this Court which condemned similar arbitrary administrative action.

Eight months after the opinion was issued, the Court of Appeals for the Fifth Circuit decided on its own motion to rehear the case en banc, without the benefit of oral argument, and this time reversed its earlier position and reinstated the judgment of the District Court, conceiving that opinion to say, inter alia, that it was not the function of the federal district courts to serve as zoning appeal boards; that the decision of local zoning authorities is an exercise of judgment legislative in character; and that such decisions are subject to judicial control only if arbitrary or if interested parties have been denied procedural due process. Judges Wisdom and Ingraham dissented and referred to their opinion in the prior Fifth Circuit decision upholding petitioners' claims.

Petitioners seek a writ of certiorari on the ground that they *have* been denied constitutionally guaranteed procedural due process in an *adjudicatory* administrative proceeding.

REASONS FOR GRANTING THE WRIT

I. When a Local Zoning Commission Considers Requests From Individual Landowners for Amendments to its Comprehensive Zoning Ordinances on a Case-by-Case Basis, and Exercises Discretionary Powers by Approving Some Applications and Disapproving Others, it Performs a Purely Adjudicatory Function, and Denial of Procedural Due Process in Such Administrative Proceedings Violates the Due Process Clause of the Fourteenth Amendment to the Constitution.

This case challenges the "settled law" in the Fifth Circuit, reiterated in the opinion of the court below, that all decisions made by a local zoning commission, usually composed of not more than five members in the community, are essentially "legislative" in character, and thus no viable distinction can be made between its functions involved in the adoption of a comprehensive zoning plan and those exercised in deciding whether or not to grant or deny a petition by an individual property owner for reclassification of one tract of land already being regulated under an existing plan.

The practical consequence of this viewpoint is enormous. It means that because everything a zoning commission does is deemed to be "legislative," it can severely restrict land use in an area under its jurisdiction in a virtually arbitrary manner since its actions are cloaked from judicial review unless arbitrary, unreasonable or capricious. More importantly, it can act on a petition from an individual landowner seeking a change in the zoning on his property so it can be used in some way other than the usually severe re-

strictions permit, and deny the request for a good reason, an arbitrary reason, or no reason at all. Protected by the myth that it is always acting in a legislative capacity, the commission is allowed to make its decisions with absolutely no requirement that it state any reasons for whatever position it decides to take, and if it does give reasons, it does not have to provide any proof whatsoever to support the conclusions reached. Because all of its acts are seen as "legislative" respondent zoning commissioners are not bound to inform a petitioning landowner which facts, if any, it is using to consider its decision. It can use facts developed at a public hearing, or it can use facts outside the public record and unknown to the applicant, or it can just use *no facts at all.* Without the burden of any requirement to prove any of its conclusions, or be accountable in any way to facts which can be tested by the usual methods afforded by minimal procedural due process, such as confrontation and cross-examination, the zoning commission is allowed to make all of its decisions without having to explain or prove to anyone why any given decision was made. A decision wherein the facts are not stated is set free from *all* facts in that the answer to any complaint can always be that there were ample *secret* facts — thus the decisions become by definition *purely arbitrary*, i.e., not based on any facts at all.

The petitioners in this case think, first of all, that there is an important difference between the way a zoning commission functions when it promulgates a set of impersonal rules disposing of everyone's welfare impartially, such as a comprehensive land-use plan for the community, and the way it functions when it considers an application from an individual landowner for an amendment to the general land-use plan and

exercises a highly discretionary power by approving or disapproving such a request. The latter is a completely *judicial* function and all that petitioners ask is that when respondents act in their *judicial* capacity that they adhere to minimal concepts of constitutional due process; i.e., *state reasons and disclose the relevant evidence underlying whatever decision is made.*

The Fifth Circuit Court of Appeals held that this case presented no substantial federal question because it decided that judgments made by a local zoning commission are acts which are essentially *legislative* in character and are thus protected from judicial review unless they are arbitrary or capricious. 491 F.2d at 7. Petitioners vigorously dispute the notion that the process whereby respondent commissioners consider petitions for rezoning individual tracts of land on a case-by-case basis is in any way "legislative" and argue to the contrary that such decisions involve an exercise of administrative discretion which is highly adjudicatory in nature. This position is completely supported by a factual analysis of the proceedings conducted by respondent zoning commissioners, and by dissenting Judges Wisdom and Ingraham, who concluded that this case did indeed present a substantial federal question on the ground that respondents' failure to disclose any *evidence* whatsoever in support of their decision denying petitioners' application for a zoning reclassification with respect to its individual tract of land amounted to a violation of minimal procedural due process guaranteed by the Fourteenth Amendment in an *adjudicatory* administrative proceeding.

A. *The administrative or judicial function distinguished from the legislative function.*

The essentials of the "legislative function" are the determination of legislative policy and its formulation and promulgation as defined in binding rules of conduct. *Yakus v. United States*, 321 U.S. 414 (1944); *Cochran v. Black*, 240 Ark. 362, 400 S.W.2d 280, 283 (1966). In *Dal Maso v. Board of Commissioners of Prince George's County*, 182 Md. 200, 34 A.2d 464 (1943), the court defined it as "the formation and determination of future rights and duties," 34 A.2d at 466. Thus, the adoption of a policy declared by Congress and its definition of circumstances in which its command is to be effective — for example, Wage and Price controls as defined by the Cost of Living Council — constitutes the performance, in a constitutional sense, of a "legislative function." See *Opp Cotton Mills v. Administrator of Wage and Hour Division of the Department of Labor*, 312 U.S. 126 (1941). Similarly, when a state public service commission undertakes to set rates for a public utility, it is exercising a "legislative function." *Delaware Coach Co. v. Public Service Commission of State of Delaware*, 265 F. Supp. 648, 652 (D.Del. 1967). In this case, the Zoning Ordinance of Gwinnett County empowers the local zoning commission to set forth general rules and enact a comprehensive zoning plan for the entire community:

> [F]or the purposes of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; . . . and for other purposes, all in accordance with a comprehensive plan for the development of the county . . . (Article I, The Zoning Resolution of Gwinnett County, Georgia.)

Petitioners do not dispute the fact that this power to lay down broad impersonal regulations for everyone's welfare is clearly a legislative function. See generally, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Diedrich v. Zoning Commission of D.C.*, 393 F.2d 666 (D.C. Cir. 1968). However, that is not the only grant of power which the resolution makes. In Article XVII, respondents are given the authority to amend the zoning provisions:

> This Resolution, including the Zoning Map of Gwinnett County . . . *may* be amended from time to time by the County Commissioners [after submission to the] County Planning Commission. . . .

This *discretionary* power, given to the zoning commission to approve or deny applications for amendments, particularly from individual property owners seeking a change with respect to one tract of land only, is clearly more akin to a judicial function.

This analysis has been supported by state courts and lower federal courts in similar zoning litigation; see, for example, *Donovan v. Clarke*, 222 F. Supp. 632 (D.D.C. 1963), where Judge Walsh noted:

> It is well established that the authority of the zoning commission is legislative [citing cases]. . . . Certainly the functions of the Commission in planning comprehensive zoning for the District of Columbia are legislative; but, it appears to this Court that *whenever the Commission acts on the petition of a resident for a change in the zoning of his property, it acts*

> *in a quasi-judicial capacity.* . . . (222 F. Supp. at 634.) [emphasis added].

Likewise, in *Morton v. Mayor and Council of Clark Township*, 102 N.J. Super. 84, 245 A.2d 377 (1968), it was held that a municipal governing body's approval or disapproval of a recommendation by the board of adjustment is a "quasi-judicial function" and not a "legislative function." 245 A. 2d at 381. The court wrote:

> A committee of its members had viewed the premises, and they had heard the parties in favor of and in opposition to the application. *They acted judicially, and adopted one of only two courses open to it, namely to grant or deny the application.* 245 A.2d at 384 (emphasis in original)

Thus, the chief distinction between a "legislative function" and a "judicial function" is that the former sets up rights or inhibitions general in character, whereas the latter interprets, applies, and enforces existing law as related to persons amenable thereto.

Other recent cases, both state and federal, indicate a strong trend in the law toward distinguishing the administrative or quasi-judicial activities of a zoning commission from exercises of its more general legislative powers. In *Citizens Association of Georgetown, Inc. v. Zoning Commission of D.C.*, 477 F.2d 402 (D.C. Cir. 1973), Judge Bazelon noted that while "It is true that the Zoning Commission is a quasi-legislative body . . . there are important elements of a non-legislative nature to the Commission's decisions." 477 F.2d at 408.

B. *It is well settled that a court may review an essentially administrative or judicial determination made by a zoning authority which deeply involves rights guaranteed by the Federal Constitution.*

There is an inherent right of appeal from an administrative decision where constitutional rights are involved. *Yakus v. United States*, 321 U.S. 414 (1944); *Southern Railway Co. v. Virginia*, 290 U.S. 190 (1933); *Crowell v. Benson*, 285 U.S. 22 (1932); *Bluefield Waterworks and Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923). The protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted, including an act of any subordinate instrumentality of the state exercising delegated legislative authority, such as an order of a commission. *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571 (1919); *cf. Carlson v. Landon*, 342 U.S. 524, reh. den. 343 U.S. 988 (1952); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936). The constitutional right to judicial review has been considered particularly strong where the administrative action may result in a deprivation of constitutional rights to life, liberty, or property. See *St. Joseph Stock Yards Co. v. United States, supra; Jones v. Securities and Exchange Commission*, 298 U.S. 1 (1936); *Crowell v. Benson, supra; Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920).

The right to a judicial determination of the question of unconstitutional deprivation of property exists whether the deprivation is by a statute passed without a hearing or by administrative orders of a commission made after a hearing, and any party affected by such action is entitled by the due process clause to a judicial

review of the question whether he has been thereby deprived of a right protected by the Constitution. *Wadley Southern Railroad Co. v. Georgia*, 235 U.S. 651 (1915). Thus, in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), this Court held that a decision made by a local authority interpreting a zoning ordinance as it applied to an individual tract of land was judicially reviewable where the owner claimed that such determination deprived him of his property without due process of law. See 277 U.S. at 188-89. Again in *Donovan v. Clarke, supra*, the District Judge said:

> [i]t appears to this Court that whenever the Commission acts *on the petition of a resident for a change in the zoning of his property, it acts in a quasi-judicial* capacity, in that a determination must be reached on the *evidence* adduced and the applicable law, ever mindful of their responsibility to the interest of the community to protect the health, safety and welfare. *Such a determination is subject to review by the courts not on the merits of the issues presented, but as to whether the action was justified or was capricious, arbitrary, unreasonable or discriminatory. SUCH A REVIEW CAN ONLY BE ACCOMPLISHED WHEN THE DECISION OF THE COMMISSION CONTAINS FINDINGS OF FACT ON WHICH THE DECISION WAS BASED.* 222 F. Supp. at 634 (emphasis added).

Thus, petitioners contend that the Court of Appeals for the Fifth Circuit erred when it held that a proceeding to act of a request for a change in the zoning of an individual tract of land involves an exercise

of judgment only legislative in character, and clearly presents a proper question for review by this Court.

II. Respondents Violated Fundamental Fairness and the Minimal Requirements of Due Process and Denied Petitioners Equal Protection of the Law:

(A) When They Failed to Prescribe Standards by Which Petitioners Rezoning Application Would be Judged;

(B) When They Made Extensive Use of *Ex Parte* Information to Reach Their Decision Without Advising Petitioners of Precisely What Evidence Was Being Considered, or Allowing Them to Cross-Examine Witnesses or Rebut or Explain Adverse Testimony; and

(C) When They Failed to Disclose Any Findings of Fact or Reveal Any Evidence to Support Their Reasons for Denying Petitioners' Request.

Because rezoning proceedings held by respondents in cases of this type are actually judicial in nature, petitioners are entitled to the substantive and procedural safeguards guaranteed by the Due Process clause of the Fourteenth Amendment.

A. *The Gwinnett County Zoning Commission's failure to promulgate rules of decision or standards for determining the merits of an individual rezoning application constitutes a gross violation of substantive due process and a denial of equal protection of the law.*

Zoning laws and regulations must satisfy the requirements of the constitutional guarantees of due process and equal protection of the laws, Thus, this

Court has stated that in order to hold a zoning regulation unconstitutional as a violation of the due process of law or equal protection clauses of the federal constitution, it must appear "that . . . [the] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365. In another instance the test was stated as whether the ordinance "is so vague and ambiguous and so lacking in standards by which it may be interpreted and applied as to deprive them of due process of law and of the equal protection of the laws . . ." *Earle v. Zoning Board of Review*, 191 A.2d 1611 (R.I. 1963).

The trial court found as a matter of law that the Gwinnett County zoning resolution sufficiently set forth the objectives to be achieved by zoning and the standards which are to govern the decisions of the local zoning authority. Yet, when petitioners were served interrogatories and specifically asked which factors they considered in making their decision not to grant petitioners' application, they responded by listing thirteen criteria *which were not and have not been promulgated by any Gwinnett County Zoning ordinance.* Thus the standards used to reach their conclusion were completely unknown to petitioners prior to the hearing held to consider their applications, *and were revealed only after this litigation forced disclosure.* How could petitioners make an effective case to support their applications *when they did not know which factors the commission was going to take into account when deciding the case?*

Petitioners contend that the District Court and

the Court of Appeals misconceived the basic difference between *objectives* and *standards*. The Gwinnett County zoning resolution sets forth broad objectives[1] which go to the issue of justifying restrictions on land use in the interest of public health, safety, welfare and morals, *but in no way prescribes any standards for deciding individual cases*. This is probably because the theoretical scheme described in Appendix "G" never contemplated making amendments to the zoning ordinance on a piecemeal basis, but also perhaps because the criteria appear to shift from case to case, making publication unwise under the circumstances. Contrary to what the Court of Appeals concluded, an examination of the record indicates that no such criteria have ever been enacted.

This failure to promulgate standards permits the commission to decide a case on *any ground it chooses* and opens the door as wide as possible to possible abuses of discretion resulting in purely arbitrary decisions. The point is that if there are no criteria then decisions must *by definition* be arbitrary.

Here, the Gwinnett County zoning resolution contains broad general aims, bounded only by the vague limits of the public health, safety, welfare and morals. The purpose of the act is not to restrict land use per se, but rather to *promote* the *public* welfare through the mechanism of land use restrictions. Under this broad mandate, the zoning commission's discretion to decide what is best is left virtually unfettered and becomes enormously susceptible to abuse. For this reason pe-

[1] E.g., lessen congestion in the streets, secure safety from fire, panic and other dangers, etc.

titioners contend the Court of Appeals erred in its determination and maintain that such error presents firm ground for reversal of the court's decision.

B. *The Due Process clause of the Constitution prohibits the gathering of ex parte information by the respondents and the use of such evidence in the decision-making process WITHOUT affording petitioners an opportunity to confront and cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal of adverse findings deprives them of fundamental rights guaranteed by the Fourteenth Amendment.*

Petitioners specifically complain that the decisive evidence considered by the respondent zoning commissioners was *gathered secretly* sometime after the August 25, 1970 meeting,[2] and therefore is not competent to support the decision. The record clearly shows that respondent Gunnin requested and won approval for a continuance of the meeting in order that the commission might obtain additional studies and consult with the Gwinnett County Engineering Department.

This makes it equally clear that as of the conclusion of the meeting on August 25, 1970, the Commis-

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[2] Exactly what constitutes a "hearing" is apparently nowhere fully defined in U.S. Supreme Court cases or in our history of Anglo-Saxon jurisprudence. However, the word does imply certain requirements of fairness including the right to know what evidence is being considered by the tribunal, to confront the opposing witnesses, to cross-examine. Not since the "Star Chamber" has secret evidence been considered to be consistent with fairness. This point is more fully developed hereinafter.

sioners were undecided and felt they needed to collect more information in order to tip the balance one way or the other; otherwise, there would be no need for the continuance, and the decision could be based on the discussions held at its meeting. Apparently, they did just that, for the Commission did not reconvene for more than two weeks, at which time it felt it had the necessary data in hand to reach a decision. It is impossible to escape the conclusion that not only did the commissioners travel well beyond the record developed at the August 25th meeting in order to gather *ex parte* information, but also that such information was crucial to the ultimate decision in the case. The District Court acknowledged these beyond-the-record excursions in the following passage:

> While some of the reasons for denying the requests were apparently the result of independent investigation by the Commissioners, this does not mean the decision is based on incompetent evidence or that plaintiff has been denied procedural due process. Since the commissioners were engaged in an exercise of legislative authority, it is not inconsistent with due process requirements for the Commissioners to make reference to reports of various county agencies. (341 F. Supp. 703, 106) [footnote omitted]

It is obvious from this excerpt that the reason the District Court felt that there was no harm done was *not* that the information was not relevant, and *not* that the information was not decisive, *but that such ex parte procedures were the privilege of a body carrying on a legislative function!* But as petitioners have argued in

considerable detail above, this action by the Gwinnett County Zoning Commission *was in fact the antithesis of a "legislative" function; the Commission here was not gathering information prior to enacting a broad rule for the general community,* cf. *Law Motor Freight v. C.A.B.*, 364 F.2d 139 (1st Cir. 1966), *it was adjudicating an individual request relating to a single parcel of land.* Therefore, petitioners contend that it was grossly improper for the Court of Appeals to sanction the use of unrevealed, untested, decisive *ex parte* information under these circumstances. See *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *United States v. Abilene and Southern Railway Co.*, 265 U.S. 274 (1924); *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227, U.S. 88 (1913); *cf. Market Street Ry. v. Railroad Commission*, 324 U.S. 548 (1945).

To this day, petitioners do not know what the decisive information was, or whether it consisted of testimony or documents or both, or whether more weight was assigned to some factors than others. The Commission evidently felt it was unnecessary to make any findings of fact since it could simply dispose of the case by "legislative" fiat. Such an attitude displays utter contempt for the rules of fair play, not to mention a total disregard of its constitutional duty to justify use of restrictions as they apply to an individual parcel of land, if requested to do so. See *Nectow v. City of Cambridge, supra.* In addition, the position taken by the Court below on the problem of use of extra-record information under these circumstances is simply inconsistent with the long-standing precedents of this Court just cited.

However, in his specially concurring opinion in the court below, Judge Roney felt that despite what has just been said, petitioners were accorded minimal due process in this case, and he cited the views of the trial court and the dissenting judge sitting on the first panel of the Court of Appeals (which decided 2-1 in favor of petitioners) as supporting this position. Neither the opinion of the trial court nor the dissent in the first opinion in the Court of Appeals supports the conclusion that petitioners did receive minimal due process in this case. First the "reasons" referred to by the trial court were actually only *conclusory statements*, and the facts, if any, on which they were based have never been disclosed to petitioners, thereby depriving them of any chance to cross-examine witnesses or rebut or explain adverse testimony, and effectively precluding any meaningful review of the decision since the facts on which it was based are unknown.

Secondly, the dissent in the first opinion in the Court of Appeals did *not* say that petitioners had been afforded minimal due process; in its opinion, the burden was on petitioners to seek the facts, since respondents had no duty to provide any, simply because their decisions were seen to be "legislative" in character. Despite what Judge Roney said, petitioners have never been advised of or received the facts, especially the extra-record information supporting respondents' decision — the "more" to which Judge Roney admits petitioners are entitled.

Professor Davis has written that "No other major problem of administrative law surpasses in practical importance the problem of use of extra-record information *in an adjudication*. The nub of the central prob-

lem is to reconcile the needs of procedural fairness with the need for full and free use of whatever expertness the agency may have, including the kind of understanding that is based on an inseparable mixture of "experience and information." Davis, Administrative Law Treatise § 15.01 (1958). Solution of the problem involves the reconciliation of "expertness" with the most essential ingredient of a fair hearing—the opportunity to know and meet the materials on the other side. Davis says the true distinction is between finding facts about the parties and determining questions of law and policy and discretion: "The cardinal distinction which . . . governs the use of extra-record facts by . . . agencies is the distinction between legislative facts and adjudicative facts. *When an agency finds facts concerning the immediate parties* [*it is*] *performing an adjudicative function*, and the facts are conveniently called "adjudicative facts." When an agency develops law or policy it is acting legislatively. Adjudicative facts relate to the parties, their activities, their properties, while legislative facts are ordinarily general and do not concern the immediate parties.

Thus, the full use of extra-record facts is to be encouraged, *except adjudicative facts specifically in dispute*, and parties should then be allowed an appropriate opportunity to meet the facts thus noticed. Obviously, more procedural protection is needed for adjudicative facts than legislative facts, and more for facts *directly affecting the decision* than for those that bear only peripherally on the decision. Davis concludes that when the facts are (1) *adjudicative*, (2) *disputed*, and (3) *critical*, *nothing less than submission through evidence, subject to cross-examination and rebuttal will normally suffice. Id.* § 15.10.

This Court has had numerous occasions to speak to this subject. In a long line of thoroughly reasoned decisions, it has worked out a doctrine, which guarantees broader procedural protection than Professor Davis argues for.

In *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227 U.S. 88 (1913) the unanimous Court said:

> [t]he Commissioners *cannot act upon their own information as could jurors in primitive days.* All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained on the theory that the Commission had before it extraneous unknown but presumptively sufficient information to support its finding.* (emphasis supplied) 227 U.S. at 93-94.

Here, this Court *specifically rejected* the idea that secret evidence (i.e., "extraneous, unknown but presumptively sufficient information) is sufficient to support an essentially adjudicative determination.

In *United States v. Abilene and Southern Railway Co.*, 265 U.S. 274 (1924), this Court made a clear

and concise statement of the rule: ". . a finding without evidence is beyond the power of the Commission. . . . *Nothing can be treated as evidence which is not introduced as such.*" 265 U.S. at 288 (emphasis added).

Commenting on *ex parte* evidence in *Morgan v. United States*, 304 U.S. 1 (1938), reh. den. 304 U.S. 23 (1938), this Court said:

> Congress, in requiring a "full hearing", had regard to judicial standards—not in any technical sense, but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature. If in a equity cause, a special master . . . permitted the plaintiff's attorney to formulate the findings on the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing . . .
>
> [t]hat is more than an irregularity in practice; it is a vital defect. 304 U.S. 1, 19-20, 22.

Thus, in the *Morgan* case this Court held that in administrative proceedings of a quasi-judicial character, the liberty *and property* of citizens must be protected by fair and open hearing; that such a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party, and to meet those claims.

Accord, Ohio Bell Telephone v. Public Utilities Commission, 301 U.S. 292 (1937).

The doctrine developed by this Court in *Louisville & Nashville, Abilene & Southern, Morgan* and *Ohio Bell* concerning the permissible uses of extra-record information have been applied to an extremely wide variety of cases by the lower federal courts. The Seventh Circuit has applied full procedural due process to an anti-trust case involving infringement of trademarks and unfair competition. See *Smith v. Dental Products Co.*, 168 F.2d 516 (7th Cir. 1948). "Here there was no opinion, no memorandum of fact and law but only the ultimate finding." [citing *Ohio Bell; U.S. v. Abilene & Southern Ry.;* and *Morgan.*] The rationale has been applied to bankruptcy proceedings in the Third Circuit, see *In re Aughenbaugh*, 125 F.2d 887 (3rd Cir. 1942), and to workmen's compensation award proceedings, *Brown-Pacific-Maxon Co. v. Turner*, 255 F.2d 611 (7th Cir. 1958). See also *Heckler v. Shepard*, 243 F. Supp. 841 (D. Idaho 1965) [loyalty oath proceeding]; *TWA v. Hughes*, 308 F. Supp. 679 (D.N.Y. 1969) [anti-trust suit]; *In re Bowen*, 58 F. Supp. 286 (D. Pa. 1944) [bankruptcy].

The Court of Appeals for the District of Columbia has applied the doctrine to *zoning cases*, in marked contrast to the position taken by the Fifth Circuit in this case. In *Shenk v. Zoning Commission of the District of Columbia*, 440 F.2d 295 (D.C. Cir. 1971), a case which the Fifth Circuit alluded to in the opinion below but which does *not* support its holding in this case, the Court of Appeals for the District of Columbia held that although the action of the zoning commission is entitled to a presumption of validity when a com-

plainant makes a factual showing that the action is arbitrary, that action cannot be sustained unless the commission puts forward *some basis of fact* and law to justify the action as consistent with reasonableness. 440 F.2d, at 297, 298. *Accord, Citizens Association of Georgetown, Inc. v. Zoning Commission of the District of Columbia*, 477 F.2d 402 (D.C. Cir. 1973), where the District of Columbia Court of Appeals held that the need for judicial review of administrative actions required the Zoning Commission to spell out its reasoning in reaching a decision so that the Court would not have to speculate as to the basis for the commission's conclusions. 477 F.2d at 408.

In *Robey v. Schwab*, 307 F.2d 198 (D.C. Cir. 1962), the same court held that in order to support its conclusions the zoning authority must make basic findings of fact and, although such findings need not amount to an exhaustive summation of all of the evidence, the agency must state the *facts* which persuaded it to arrive at its decision. 307 F.2d at 202. That same decision also held that a mere reiteration of the zoning regulations insofar as they set forth conditions necessary for allowance of a request would not satisfy this requirement. 307 F.2d at 201. In *Hot Shoppes, Inc., v. Clouser*, 231 F. Supp. 825, *aff'd* 346 F.2d 834 (D.C. Cir. 1965), the bare statement made by the zoning authority that it had sufficient *ex parte* information to support its decision *did not* raise a presumption that the authority had facts to support its conclusion, where it did not set forth the facts upon which it relied in reaching its conclusion. Finally, in the *Shenk* opinion it was held that insufficient governmental facilities such as roads, schools and sewage treatment facilities *was not* a valid objection to rezoning for apartments,

and that the action of the Zoning Commission was *arbitrary* where eleven previous cases were granted over similar objections.[3]

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[3] In the instant case, Exhibit "B" to respondents' answers to petitioners' First Interrogatories indicated that between August 1968 and August 1970, of 30 applications by developers for rezoning in Gwinnett County, 19 were approved, 9 were disapproved, and 2 were withdrawn. More interesting was the trend revealed by the yearly breakdowns:

	Approved	Disapproved	Withdrawn
Year 1	15	0	0
Year 2	3	5	1
Year 3	1	4	1

It is difficult to avoid the conclusion that until August 1969, the county welcomed developers with open arms, and later, as resistance from current residents started to mount, a quota system was imposed. Whether any of these decisions were made solely with respect to the land involved and matched against the constitutional standards requiring that such measures be reasonably related to the public health, safety, welfare and morals is a highly speculative question.

As was pointed out earlier, a zoning commission allowed to use its "unfettered discretion" when no concrete standards for adjudicating cases have been prescribed, becomes a sort of potential breeding ground for "graft and corruption"; this situation naturally occurs whenever there is an oversupply of qualified applicants, which causes the local governing body to institute some sort of a quota system. As petitioners have pointed out in the "History of Zoning" in Appendix G attached hereto, the early idea of a comprehensive plan in zoning has gradually evolved into a quota system for controlling development. The net result is that on parcels of land which are virtually indistinguishable, some applications are approved and others are not. The only way to ensure that the legitimate public interest is maintained in these proceedings is to require that full due process be granted at all zoning hearings.

Thus, the instant case indicates that there is a clear split of opinion on the issue between the Court of Appeals for the Fifth Circuit and the Court of Appeals for the District of Columbia, presenting an important question of federal law which should be settled by this Court.

Despite the clear procedural basis for the claim in this case, respondents have throughout the course of this litigation insisted that if the court grants relief to petitioners, and holds that zoning commissions acting on applications to rezone individual tracts of land must henceforth state facts and reasons in support of whatever decision is reached, the floodgates will be opened to a deluge of similar cases in the lower federal courts. Nothing could be further from the truth.

Petitioners agree that a federal court should not sit as "super zoning board" and be asked to substitute its judgment for that of the local authority; the claim here goes not to the merits but rather the procedures employed in the decision making process in this case. All the local zoning commission has to do is adhere to concepts of minimal due process embodied in the Fourteenth Amendment to the United States Constitution when deciding the merits of these applications on a case-by-case basis. This simply translates into the fair requirements that the zoning commissioners base their decisions only on evidence contained in the record adduced at the statutory hearing, and thereafter state their reasons for whatever determination is made. There is no reason to assume that a flood of similar litigation will ensue in the federal courts if this Court makes such a rule of law; that will not happen as long as the local zoning authorities follows these few basic

constitutional precepts of procedural due process. Federal courts have not in the past, nor have they begun now to express any opinion on the merits of decisions made by local zoning authorities, as long as they are not completely arbitrary.

Finally, petitioners' contentions concerning use of extra-record information are well supported by numerous other authorities. Rule 2-01 of the Proposed Federal Rules of Evidence, entitled "Judicial Notice of Adjudicative Facts" provides (e) OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed." 46 F.R.D. 161 (1968). The Advisory Committee's Note on the rule states "Basic considerations of procedural fairness" as the rationale. *Id.* at 204. Furthermore, the treatise writers, both old and modern, have long favored admission of evidence in disproof of facts of which judicial notice is taken. See e.g., Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore §§ 2587-68; Davis, *A System of Judicial Notice Based on Fairness and Convenience, in Perspective Law*, 69, 76-77 (1964).

C. *The respondents failure to state findings of fact to support its conclusion precludes effective judicial review of the decision, and thereby deprives petitioners of procedural fairness required by the Constitution.*

The minutes of the Gwinnett County Commissioners' meeting indicate that petitioners' rezoning applications were denied for the following reasons: 1. Insufficient water and inadequate sewage facilities in the

area; 2. Inadequate roads — road arteries are already congested; 3. Inadequate schools — already overcrowded; 4. Located between two prime residential areas and would seriously affect them; 5. Large amount of RM zoned land is undeveloped in the immediate area.

When asked the facts underlying these reasons, the Board's total reply was simply "The decision of the Board of Commissioners was not based on any arbitrary findings but was based on a factual situation and the facts were readily available to the Board of Commissioners for them to make a determination." *Id.* Fantastic: no facts and figures or offers of proof whatsoever to indicate why the roads and schools are allegedly inadequate; no reference to any sewage, road, or water report by the county engineering department, although respondent Gunnin claimed he could not reach a decision until he adverted to such information — and now petitioners are supposed to take it on faith that the decision was not arbitrary. Petitioners contend that the Zoning Commission's failure to reveal any findings of fact to support its decision in this case violates not only the rules of fair play embodied in the due process clause of the 14th Amendment, but also well-established principles of sound judicial policy.

The rationale for requiring specific findings of fact was elucidated best by the late Mr. Justice Frankfurter in this Court's now famous opinion in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), an SEC reorganization order case:

> *[T]he courts cannot exercise their duty of judicial review unless they are advised of the*

> *considerations underlying the action under review . . . [t]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.* 318 U.S. at 94 (emphasis added).

The *Chenery* rule has been applied to the widest variety of cases imaginable, in virtually every Federal Circuit Court of Appeals. See, for example, *Florida Power Corp. v. FPC*, 425 F.2d 1196, 1203 (5th Cir. 1970); *Beck v. SEC*, 413 F.2d 832 (6th Cir. 1969), modified on other grounds, 430 F.2d 673 (1970); *Industrial Union Dept. v. Barber-Coleman Co.*, 348 F.2d 787 (D.C. Cir. 1965) [labor case]; *Tejeda v. U.S. Immigration & Naturalization Service*, 346 F.2d 389 (9th Cir. 1965) [inadequate findings to justify deportation].

Several times in recent years, this Court has felt compelled to restate the rule to reluctant or reticent fact-finding authorities. *Goldberg v. Kelly*, 397 U.S. 254 (1970), made it incumbent on welfare agencies to state findings and reasons: "In such cases, the decision maker need not file a full opinion . . . but should state the reasons for his determination and indicate *the evidence he relied on.*" 397 U.S. at 271 (1970) (Emphasis Added). Again in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), "a tenant would have considerable difficulty effectively defending against such an admittedly illegal eviction if the Authority were under no obligation to disclose its reasons." Finally, in *Garner v. Louisiana*, 368 U.S. 157 (1961), the Court invoked its sparingly used "no evidence" rule and applied the rationale to a case involving deprivations of liberty: ". . . there is no way by which an appel-

late court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence when that evidence is unknown. Such an assumption would be a denial of due process." 369 U.S. at 173.

Zoning litigation has been replete with cases demanding that administrative bodies make findings of facts and give reasons for their decisions. See, e.g. *Robey v. Schwab*, 307 F.2d 198 (D.C. Cir. 1962); *Hot Shoppes Inc., v. Clouser, supra.*

In summary, petitioners contend that in adjudications of substantial importance, such as decisions involving a citizen's property, the desirability of reasoned opinions is clear. Their preparation affords a safeguard against arbitrary or careless action, and the resulting body of precedents makes for consistency and predictability, two attributes cherished not only by the fathers of modern zoning, but by all of civilized society as well.

III. The Protection Of Private Property Rights Is An Interest So Deeply Rooted In Our Social Structure And So Fundamental To the Stability Of Our Civilization That Procedural Due Process In An Adjudicatory Zoning Proceeding Is Required To Ensure That Respondents' Exercise Of Its Regulatory Police Power, Which Severely Restricts An Owner's Use Of His Property, Comports With The Constitutional Mandate That Such Controls Be Reasonably Related To The Public Health, Safety, Welfare And Morals.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any

person of life, liberty, *or property* without due process of law." The Fifth Amendment states that private property shall "not be taken for public use, without just compensation," and the Fourteenth Amendment has been interpreted to impose the same obligation on the states. See, *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897). Accordingly, when the government seeks to "take" private land for a new postoffice or a park or an airport, it resorts to the power of eminent domain: the property is taken through condemnation and the owner is entitled to "just compensation." Under the police powers and other regulatory powers, however, government may impose restrictions on property that produce a substantial diminution in its value; and this Court has held that government need not compensate the owner for losses that are incidental consequences of valid regulations. See, e.g., *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926); *Goldblatt v. City of Hempstead*, 369 U.S. 590 (1962). The limits of the police power are extremely difficult to pin down. Nevertheless, in the context of zoning, *Euclid* holds that some loss of value resulting from restrictions is constitutionally noncompensible as long as the regulation is reasonably related to the public health, safety, welfare and morals. Thus, residential zoning is not invalidated by the *bare* fact that if the property were available for business purposes its market value would be greatly enhanced, and will be upheld *unless the decision is arbitrary.* See, *City of St. Paul v. Chicago, St. Paul, M. & O. Ry.*, 413 F.2d 762 (8th Cir. 1969); *Leventhal v. District of Columbia*, 100 F.2d (D.C. Cir. 1939). However, it is clear that the degree of public *necessity* relates to how far the legislature can reduce a landowner's property rights without there being a taking; the reduction in an owner's land value

must benefit the public health, safety, welfare or morals in order to be constitutional. In zoning litigation, the lines of demarcation are drawn between the rights of the individual landowners and the police powers of the state; and while every owner has a duty to step aside in the public's interest, there is a corollary right not to be pushed aside when the public's interest is not at stake.[4] Petitioners contend, therefore, that a property owner should be able to advance in court the inquiry whether his property rights are being interfered with for a legitimate purpose. *The question then becomes not whether the restrictions are so severe as to amount to a 5th Amendment "taking", but instead whether the limitations imposed, however slight, can be justified by the public interest, i.e., health, safety, welfare and morals. If it cannot be so justified, then the restriction is simply an unconstitutional restraint on the owner's fundamental right to use his land in any way which the Constitution permits.* Property rights are after all, *individual* rights, i.e., the right of an *owner;* not the right of the property.

The correctness of the term "fundamental right" in this context cannot be overstressed. The concept of individual ownership of property goes to the very structure of society itself and is deeply rooted in universal sentiments of justice. According to the philosopher David Hume, no lasting societal association would be possible if people might "trespass" against one another.[5] Jeremy Bentham refined Hume's philosophy,

[4] See, M. Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude,* 69 Mich. L. Rev. 655, 688 (1971).

[5] See Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 Harv. L. Rev. 1165 (1967).

to suggest that a high level of productivity in society depends on the rules of forebearance which assure to every person who invests or labors that he will share in the fruits of his investment or labor to a predictable extent.[6] Thus, the intensity of productive activity is directly related to the extent that each member of society is willing to stick by the rules. Property, according to Bentham, is regarded as the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources. His view regards property as a human right such that a human being's interest in his property becomes an extension of himself. This view leads Bentham to conclude that men will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings. Thus, any *unpredictable redistribution* is potentially destructive of society's material well-being, and is always something of a disappointment to the expectations which Bentham described as the essence of property.

It is then the principle that *any arbitrary or capricious redistribution* imposed by public authority *contributes to the disintegration of society* which lies at the heart of the Fourteenth Amendment's prohibition against a taking of property without due process of law. *Our concept of property, with its attendant sense of expectations, is so completely interwoven into our social fabric that it becomes incumbent on the local zoning authority to administer its power scrupulously.*

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[6] Bentham, Theory of Legislation, "Principles of the Civil Code," Dumont, ed. Hildreth, trans. (1864).

To the extent that a landowner is willing to question the validity of regulations as they apply to his property, the zoning authority has a public duty to come forth and present its case, with facts and reasons, in a full and open hearing, in order to avoid the disincentive effects which otherwise result from apparently arbitrary and unjustified distribution decisions.

No five man commission should be able to sit with its arms folded and refuse to intelligently justify its zoning decision; presumably only the commission has access to all the facts which led it to its conclusion, and if they are not disclosed to the property owner, he stands virtually no chance of being able to successfully challenge this "legislative" fiat.

The most common zoning regulation is the *use* restriction, of course; this means the government has decided to "take" some uses from the landowner, while leaving others intact. It also gives courts a rationale for saying that there has been no "taking" when a piece of property can still be put to *some* use, but the constitutional validity of any such holding rests on the thin reed of assumption that all of the other possible but prohibited uses were taken with a concomitant increase in the general welfare, including the landowner's, naturally. Petitioners suggest that the Court should distinguish constitutional benefits from non-constitutional ones on the basis of who it is exactly that is being benefited. A measure benefits the public welfare in a constitutional sense, for example, if it is designed to ensure a pure water supply for the community, but not if it merely protects existing property values of a handful of surrounding neighbors at the

expense of one landowner,[7] or if its only purpose is to exclude persons of other economic classes from the area entirely[8] — a consideration having absolutely nothing at all to do with the characteristics of the land in question or the variety of uses it might be suitable for — again, usually at the expense of one or two owners. Furthermore, a "taking" which severely restricts an owner, i.e., where only one of several possible uses is permitted, which returns only a nominal benefit to the general community, should be examined extremely closely by a reviewing court. The valid exercise of the police power should not extend to grossly unequal bargains in which the public receives so little in return for exacting such a high price from a few landowners. This is precisely the sort of governmental activity which Holmes was adverting to when he condemned the society which finds it "necessary" to sacrifice individuals in the interest of the mass; clearly, a *civilized* government only imposes disproportionate hardships on its citizens when they cannot be avoided.[9] There is no indication of that circumstance in this case: no facts, no findings — just a take-it-or-leave-it conclusion. Such a position completely undercuts the policy behind the "taking" provisions of the Fourteenth Amendment and under the circumstances constitutes a blatant violation of due process guaranteed by the

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[7] Note respondents' "reason" No. 4 for denying petitioners' request: "Located between two prime residential areas and would seriously affect them."

[8] See, Sager, *"Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 Stan. L. Rev. 767 (1969): see also, Note, *Exclusionary Zoning and Equal Protection,* 84 Harv. L. Rev. 1645 (1971); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

[9] O. W. Holmes, The Common Law 37 (M.Howe ed. 1963).

same constitutional provisions. Petitioners agree that the sheer cost of evaluating every individual "taking" involved in a legitimate zoning regulation makes cash compensation infeasible, and it understands that in lieu of that payment it receives part of the overall proportionate benefit distributed to the general community. At the same time, it must be insisted that the local zoning commission scrupulously administer its authority in accordance with the law so as not to infringe any more than is absolutely necessary on an individual landowners' interest in his real property. Both the Constitution and the strongest possible policy reasons demand it.

IV. The Doctrine of Exhaustion Of Administrative Remedies Is Not Applicable To The Facts Of This Case, Where The State Provides No Machinery To Protect The Rights Of A Landowner Guaranteed To Him By The Fourteenth Amendment To The Constitution Of The United States.

In the dissenting opinion in the first decision of the Fifth Circuit Court of Appeals in *South Gwinnett Venture v. Pruitt*, Judge Bootle raised the issue of primary jurisdiction, or more precisely, the doctrine that a litigant be required to exhaust his administrative remedies before appealing to the courts for protection and enforcement of his constitutionally guaranteed rights. 482 F.2d at 392. (Petitioners of course, had exhausted their remedies before the respondents, members of the Gwinnett County Zoning Commission.) This argument naturally assumes that such an administrative body or bodies exist, and that they are empowered to grant the relief which petitioners initially prayed for in their complaint.

In Judge Bootle's view, the proper administrative agency in this instance would be the Zoning Board of Appeals for Gwinnett County, Georgia. Assuming that this agency possesses sufficient expertise to pass judgment on zoning matters, the question remains, does the Zoning Board of Appeals have the *power* to grant the relief sought for in this case? Petitioners contend that the Zoning Board of Appeals has no power to grant them relief on any substantive issues (denial of their application for an amendment which would grant them *use* rezoning) or procedural issues (denial of constitutional due process in an adjudicatory setting) which the District Court and the dissent in the first opinion in *South Gwinnett Venture* contend are involved in this case. The Code of Georgia and the Zoning Resolution of Gwinnett County, Georgia give the Local Zoning Board of Appeals only the following extremely *narrowly drawn* powers [see Ga. Code § 69-1211]:

(1) it can *correct errors* made by "an administrative official", which presumably means mistakes by the Building Inspector, although the act does not give any clues as to who he is supposed to be. Since the Building Inspector only issues permits at the threshold of building *after* a specific *use* is *approved*, he cannot commit "error" by refusing to issue a permit for an unauthorized use of the property;

(2) it can *grant a special exception*, but nowhere in the act are any standards set out to tell one what it is, or what one must do in order to get one. In virtually every jurisdiction, including Georgia, it has been construed as a very narrow concept, limited to airports, gasoline stations, etc. — the sorts of things which are either "one of a kind" in each community, or else nec-

essary but cannot be created as a matter of right; e.g., a "gas station district" would not work, really;

(3) it can *grant a variance* from the ordinance, but only under the following conditions:

> [w]here, *owing to special conditions*, a literal enforcement of the provisions of the ordinances or resolution will, in an individual case, result in *unnecessary hardship* . . . Such variance may be granted in such a case of unnecessary hardship upon a finding by the board of appeals that:
>
> (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography, *and*
>
> (b) the application of the ordinance or resolution to this particular piece of property would create an unnecessary hardship, *and*
>
> (c) such conditions are peculiar to the particular piece of property involved, *and*
>
> (d) relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution: *Provided, however that no variance may be granted for a USE of land or building or structure that is prohibited by the ordinance or resolution.* Ga. Code § 69-1211 (emphasis added)[10]

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[10] Article 15, §1605 of the Zoning Resolution of Gwinnett County sets forth virtually the same language, except that it adds one further proviso "and . . . Such conditions are

The last proviso really slams the door on any chances an owner might have for obtaining a *use* exception. Quite obviously, the variance is not a mechanism for implementing general principles, but only one for ironing out tiny wrinkles in the comprehensive plan wherever it pinches really hard. Thus, the Board of Appeals performs only a minor judicial function which assumes an extremely detailed plan in the background — otherwise, how could one tell if it really "pinches"? Traditionally, the granting of variances has been limited to small setback adjustments and other similar corrections, and the proviso in section (d) above makes it clear that this administrative agency has no power whatsoever to approve amendments which would rezone a tract for a different *use* than the one specified by the zoning commission in the comprehensive zoning plan, nor is it empowered to grant relief to a petitioner who makes a broad constitutional attack on the procedures which the local zoning authority used to decide whether or not to approve a request for an amendment to the plan to rezone a specific tract of land from one use to another, different use.

The discretionary power to *amend* the zoning ordinances is specifically *withheld* from the Zoning Board

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not the result of any actions of the property owner . . ." This stipulation is definitely *ad hominem*, and may well be invalid because they refer to the person and not to a set of neutral principles governing the land. See *Vlahos Realty Co., Inc., v. Little Boar's Head*, 101 N.H. 460, 146 A.2d 257 (1958); cf. Note, *The Ad Hominem Treatment of Zoning Problems*, 109 U. Pa. L. Rev. 992 (1961). The idea that the plaintiff buys land knowing of the zoning restrictions is practically irrelevant—that is how most building gets done—by changing the zoning ordinance.

of Appeals and is vested *only* in the local governing body. See Ga. Code §§ 69-1210, and thus in Gwinnett County, Georgia if an application for an amendment to the zoning ordinance to rezone a specific tract of land is denied by the local zoning commission, there is no available administrative forum where the unsuccessful landowner can have the decision reviewed, because:

> (1) the only method by which one can obtain permission to change the *use* restrictions on his land is by amendment to the zoning ordinance,
>
> (2) the only body which has the power to grant an amendment to an existing ordinance is the zoning commission, and
>
> (3) the zoning commission has just denied the request for a change of use. Furthermore, because it contends that it is a "legislative" body exercising a "legislative" function when it denies an application for rezoning a specific tract of land, it contends that it does not have to disclose the reasons for its decision, nor does it need to disclose whatever evidence it considered, if any, in reaching its determination.

Thus, even if the Zoning Board of Appeals had the power to review amendment decisions, which it does not, the failure to state reasons would preclude any meaningful review and would constitute a fatal constitutional defect in the proceedings.

The procedural quirks just examined in the limited powers granted to the Zoning Board of Appeals demonstrate conclusively that there is in fact no administrative remedy at all provided to the rezoning petition-

er who has just unsuccessfully sought an amendment to the zoning ordinance as it applies to his particular tract of land, especially if he desires to challenge the decision-maker's procedure on broader constitutional grounds. Thus petitioners contend that they do not have to go first to the Zoning Board of Appeals when their case is one which the Zoning Board of Appeals has no authority to grant relief for, and therefore, the doctrine of primary jurisdiction is inapplicable to the facts of this case.

CONCLUSION

In view of the grave constitutional defects found in the procedures which the respondents used to deny petitioners' request for rezoning in this case, petitioners pray that their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be *granted.*

Respectfully submitted,

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Of Counsel

CERTIFICATE

It is hereby certified that three (3) copies of the above and foregoing Petition for Certiorari and Appendix have been served upon opposing counsel of record by placing same in the United States Mail, postage prepaid this 10th day of June, 1974.

GORDON DEAN BOOTH

ROBERT N. MEALS, JR.

APPENDIX A

United States District Court
Northern District of Georgia
Atlanta Division

Rockbridge Associates, Ltd., a Georgia Limited Partnership,

vs.

W. R. (Dudge) Pruitt, Julian W. Archer, Marion Buice, Ray W. Gunnin, and Carvis P. Williams, Individually and as Commissioners of Gwinnett County, Georgia; and Ralph Herrington Individually and as Chief Building Inspector of Gwinnett County.

Civil Action No. 14483

ORDER

(Filed in Clerk's Office September 30, 1971)

Plaintiff, a Georgia limited partnership, is the owner of a parcel of land in Gwinnett County, Georgia. A portion of plaintiff's property is presently zoned R-85 (residential); another portion is zoned C-2 (commercial). In June, 1970, plaintiff applied to the Gwinnett County Planning Commission to have the property rezoned to an RM (apartment) classification. Though the Planning Commission recommended approval of the rezoning request, the Gwinnett County Commissioners refused to follow this recommendation and the ap-

plication for rezoning was denied. The complaint alleges that the decision of the county commissioners violates plaintiff's equal protection and due process rights under the Fourteenth Amendment.[1] Specifically, it is alleged that (1) the decision of the County Commissioners was arbitrary, capricious, and amounted to a taking of property without due process in that it arbitrarily interfered with plaintiff's rights in and use of its property and deprived plaintiff of a major portion of the value of its property; (2) the decision of the County Commissioners was not based upon competent evidence establishing that the proposed rezoning was inconsistent with the objectives of the county's zoning resolution; (3) the decision of the Commissioners discriminated arbitrarily between plaintiff's property and property similarly situated; (4) plaintiff was denied certain procedural safeguards; and (5) the delegation of zoning authority by the State to local governing bodies denies citizens, who do not live within the County, the right to participate effectively in zoning matters, since they cannot vote for the County Commissioners.

Defendants have moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted. At plaintiff's request a hearing was held at which plaintiff candidly

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[1] Plaintiff's complaint couches its attack as an attack on portions of the zoning ordinance and zoning map of Gwinnett County. At the hearing in this case it clearly appeared that what plaintiff attacks is the decision of the County Commissioners which denied plaintiff's rezoning application. The attack may be viewed as directed toward the zoning ordinance and maps only insofar as they reflect the decision of the Commissioners.

clarified its contentions and the facts in this case. Upon considering the allegations of the complaint in light of the facts and contentions presented at the hearing, the court concludes that no substantial federal question is presented and the complaint must therefore be dismissed.

At the outset it should be noted that the federal district courts are courts of limited jurisdiction. It is not their function to serve merely as a zoning appeal board. The individual merits of local zoning matters are appropriately left to the sound discretion of local zoning authorities. This court is charged only with the responsibility of insuring that zoning decisions are not made in a manner which contravenes the mandates of the United States Constitution. Since the decision of local zoning authorities is an exercise of judgment legislative in character, these decisions are subject to judicial control only if arbitrary or if interested parties have been denied procedural due process. *Diedrich v. Zoning Commission of the District of Columbia*, 393 F.2d 666 (D.C.Cir. 1968); *Hot Shoppes, Inc. v. Clouser*, 231 F.Supp. 825 (D.D.C. 1964).

While it is true that the decision of local zoning authorities restricts the uses of certain property and in some instances may cause the property to be used for other than its most profitable use, these factors do not cause the decision to be unconstitutional, unless the decision is arbitrary. *Goldblatt V. Hempstead*, 369 U.S. 590 (1962); *City of St. Paul v. Chicago, St. Paul, M. & O. Ry.*, 413 F.2d 762 (8th Cir. 1969); *McCleskey v. Barrett*, 386 F.2d 159 (5th Cir. 1967). In denying plaintiff's rezoning request the County Commissioners

assigned reasons[2] for their action which are consistent with the objectives of the zoning resolution.[3] Therefore, in the absence of a showing that there was no evidence to support the decision, the action taken by the County Commissioners cannot be found to be arbitrary.

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[2] The minutes of the County Commissioners' meeting of September 9, 1970, indicate that the rezoning application was denied for the following reasons: "1. Insufficient Water [sic] and inadequate sewage facilities in the area; 2. Inadequate roads—road arteries are already congested; 3. Inadequate schools—already overcrowded; 4. Located between two prime residential areas and would seriously affect them; 5. Large amount of RM zoned land is undveloped [sic] in the immediate area. Mr. Gunnin stated that he saw no need for additional RM zoned property. Carvis Williams seconded the motion and same was unanimously adopted."

[3] Article I of the Zoning Resolution of Gwinnett County, Georgia, states the purpose of the resolution as follows:

". . . [F]or the purpose of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; of lessening congestion in the streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the overcrowding of land, avoiding both undue concentration of population and urban sprawl; facilitating the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; protecting property against blight and depreciation; encouraging the most appropriate use of land, buildings and other structures throughout the County; securing economy in government expenditures; and for other purposes, all in accordance with a comprehensive plan for the development of Gwinnett County, the County Commissioners of Gwinnett County do hereby ordain and enact into law the following Articles and Sections of the Zoning Resolution of Gwinnett County, Georgia."

Not only does the record indicate that evidence was presented at an August 25, 1970 hearing before the Commissioners but plaintiff does not assert that there was no evidence to support the decision. What plaintiff specifically complained of at the hearing is that the evidence considered by the Commissioners was "secret evidence", not competent to support the decision. The charge that "secret evidence" was considered stems from the allegation that certain evidence was considered which was not presented at the hearing before the Commissioners. The record clearly indicates that a hearing was held before the Commissioners on August 25, 1970, at which the rezoning application was discussed and evidence received both supporting and opposing the rezoning. The record further shows that one of the Commissioners requested a continuance in order that he might obtain additional studies and consult with the Gwinnett County Engineering Department. On September 9, 1970, the Commissioners again considered plaintiff's rezoning application and denied it. While some of the reasons for denying the requests were apparently the result of independent investigation by the Commissioners, this does not mean the decision is based on incompetent evidence or that plaintiff has been denied procedural due process.[4] Since the Commissioners were engaged in an exercise of legislative authority, it is not inconsistent with due process requirements for the Commissioners to make reference to reports of various county agencies.

At the hearing held in this case, plaintiff further

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[4] In essence plaintiff claims denial of procedural due process in that it was not afforded the right of confrontation with respect to sources of the alleged "secret evidence."

asserted that it did not know in advance what factors the Commissioners would consider in making their determination and were, therefore, vulnerable to "secret evidence." As a matter of law, this contention is without merit. The Gwinnett County zoning resolution sufficiently sets forth the objectives to be achieved by zoning and the standards which shall govern the decisions of the local zoning authority. As a rezoning applicant plaintiff had the burden of demonstrating that its plan was consistent with those objectives and standards.

Therefore, as to plaintiff's due process contentions it not only clearly appears that plaintiff was afforded procedural due process in connection with the various hearings before local zoning authorities, but there is nothing to indicate that the decision of the Commissioners could be found to be arbitrary.

Plaintiff's equal protection allegations are equally without merit. Since the Commissioners' decision was not arbitrary, the fact that plaintiff's property is not accorded the same zoning status as another parcel of land does not mean that equal protection has been denied. Under any zoning scheme various parcels of property are permitted certain limited uses. Only if the zoning decision arbitrarily draws the line between various uses does the zoning violate equal protection. As to plaintiff's final equal protection argument regarding the right to vote for local zoning officials it is questionable whether a limited partnership has standing to raise the question since it cannot vote. However, even if standing is present, the argument is without merit.

For the foregoing reasons, the complaint is hereby Dismissed.

This 29 day of September, 1971.

Newell Edenfield
United States District Judge

United States District Court
Northern District of Georgia
Atlanta Division

South Gwinnett Venture, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green

vs.

W. R. (Dudge) Pruitt, Julian W. Archer, Maron Buice, Ray W. Gunnin, and Carvis P. Williams, Individually. and as Commissioners of Gwinnett County, Georgia; and Ralph Herrington, Individually and as Chief Building Inspector of Gwinnett County

Civil Action No. 14844

ORDER

(Filed in Clerk's Office September 30, 1971)

For the reasons set forth in the companion case, **Rockbridge Associates, Ltd. v. Pruitt,** Civil Action No. 14483 (N.D.Ga., Sept. 29 1971), the complaint in the above-captioned case is Dismissed.

This 29th day of September, 1971.

NEWELL EDENFIELD
United States District Judge

APPENDIX B

In the United States Court of Appeals
for the Fifth Circuit

No. 71-3420

South Gwinnett Venture, a partnership composed of
South Gwinnett Apartments, Inc. et al.,
Plaintiffs-Appellants,

versus

W. R. (Dudge) Pruitt, et al.,
Defendants-Appellees.

No. 71-3421

Rockbridge Associates, Ltd.,
a Georgia Limited Partnership,
Plaintiff-Appellant,

versus

W. R. (Dudge) Pruitt, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Georgia

(April 4, 1973)

Before Wisdom and Ingraham, Circuit Judges and
Bootle, District Judge

Ingraham, Circuit Judge: These appeals arose from suits filed in the district court by the respective plaintiffs, each against the Commissioners and the Chief Building Inspector of Gwinnett County, Georgia,

each praying that certain portions of the zoning ordinance enacted by the Commissioners be declared unconstitutional and that the Chief Building Inspector issue building permits for the constructions of apartments upon the subject property. The district court dismissed the suits upon the motions of the defendants, holding that the rezoning applications called for a quasi legislative judgment by the zoning board, and as such the district court was without subject-matter jurisdiction to review the actions for anything more than arbitrariness and interest on the part of the board members.

The use of non-record secret evidence by the Gwinnett County Commissioners in denying appellants' application for the rezoning of certain tracts of land from single family residential classification to multi-family apartment use designations has projected purely local land use questions into a federal forum.

Contending that their applications had been denied by the Commissioners on evidence dehors the record and that the Commissioners' reliance on such evidence deprived them of due process, the appellants brought suit against the County Commissioners in federal district court asserting jurisdiction under 28 U.S.C. § 1331(a). The district court, noting that federal courts are properly loathe to stretch their limited jurisdiction to become super zoning boards of appeal, found the denial of an application for rezoning to be a quasi-legislative act. As such, the court reasoned it was not impermissible for the quasi-legislators to use non-record materials in exercising their judgment. Consequently, the court dismissed appellants' complaint. 341 F.Supp. 703 (N.D.Ga., 1971).

We differ in only one salient regard from the decision of the district court. Our difference concerns the nature of an application for the rezoning of a tract of land. As we recently noted in *Higginbotham v. Barrett*, F.2d (5th Cir., 1973) [No. 72-1526, February 14, 1973]:

> "The law is settled that the zoning of property, including the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis. *Shenk v. Zoning Commission of the District of Columbia*, D.C. Cir., 1971, 440 F.2d 295, 297; *Diedrich v. Zoning Commission of the District of Columbia*, D.C. Cir., 1967, 393 F.2d 666; *City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 8 Cir., 1969, 413 F.2d 762, 766-7. Cf. *Goldblatt v. Town of Hempstead*, 1962, 369 U.S. 590, 594-5, 82 S.Ct. 987, 8 L.Ed.2d 130."

The adoption of a legislative plan for the entire community must be distinguished from the treatment which a specific tract of land receives when its owner petitions for reclassification under that plan. As the record in this case demonstrates, consideration of that petition is an exercise of legislative power in a case by case adjudicative setting. *Compare, Londoner v. Denver*, 210 U.S. 373 (1908) with *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441 (1915). *See, Hot Shoppes, Inc. v. Clouser*, 231 F.Supp. 825 (D.C., 1964), affirmed 346 F.2d 834 (D.C.Cir., 1965); and *Donovan v. Clarke*, 222 F. Supp. 632 (D.C., 1963). Cf. *State ex rel Ludlow v. Guffey*, 306 S.W.2d 552 (Mo.,

1957); *Morton v. Mayor and Council of Clark Township*, 102 N.J.Super. 84, 245 A.2d 377 (1968). *See*, generally, K. Davis, Administrative Law Text. Thus distinguished from the legislative action of adopting a comprehensive zoning plan, the adjudicative decision inherent in tract rezoning requires the decision maker to adhere to concepts of minimal due process. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir., 1964); *Hot Shoppes, Inc. v. Clouser*, supra; *Donovan v. Clark*, supra. Here, appellants' complaint alleged that rezoning of the property had been denied by the Commissioners without a statement of their reasons and by recourse to evidence which was not in the record. Such administrative action has long been condemned, *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924); *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913); *Hornsby v. Allen*, supra, and we do so here.

The orders of the district court are Reversed and the causes Remanded for proceedings consistent herewith.

Bootle, District Judge, dissenting:

I respectfully dissent. I would affirm for all reasons stated by the Trial Court in his memorandum opinion, *Rockbridge Associates, Ltd. v. Pruitt*, 341 F.. Supp. 703 (N.D. Ga., 1971), plus an additional reason to be stated. I agree with the Trial Court "that plaintiff was afforded procedural due process in connection with the various hearings before local zoning authorities" and that "there is nothing to indicate that the decision of the Commissioners could be found to

be arbitrary." The majority opinion groups these two cases together and over-reacts, I think, to the contention of one of the plaintiffs that as to it the County Commissioners in star chamber fashion used non-record secret evidence. I, naturally, have examined that charge carefully. First, it must be noted that only Rockbridge Associates, Ltd. makes this contention. South Gwinnett Venture's case was considered by the Commissioners on November 24, 1970 and again on December 1, 1970, and there is no contention that any secret evidence was used in the consideration of that case. The Rockbridge case was considered by the Commissioners earlier on August 25, 1970 and September 9, 1970, and it is in connection with these earlier hearings that Rockbridge claims the use of secret evidence. Secondly, I think this charge is unsubstantiated. What happened is this: at the August 25, 1970 hearing one of the Commissioners moved to "table the decision for two weeks so that he could obtain additional studies and consult with the Engineering Department." This does not sound star chamberish. His intentions were announced in open meeting. The postponement was for two weeks. The Engineering Department of Gwinnett County is probably not so large that plaintiffs could not have ascertained whatever information it furnished the Commissioners had they so desired. Nor does any reason appear why they did not inquire at the resumed hearing on September 9, 1970 as to what additional studies, if any, the Commissioners had obtained. Rockbridge argues that the Commissioners have refused to disclose the contents of their conversation with the Engineering Department and the additional studies. Nothing in the record substantiates this argument. Nor was there any request by plaintiffs for any more complete or detailed findings of fact by the

Commissioners. All this suggests that plaintiffs' desire to make a federal case exceeded their fear of deprivation of due process.

An additional reason not specifically assigned by the Trial Court for dismissing the complaint is failure of the plaintiffs to exhaust their administrative remedies. While a litigant normally need not exhaust his state "judicial" remedies, normally he must exhaust his state "legislative" or "administrative" remedies before challenging state action in federal court. *See* Wright, Federal Courts, § 49, p. 187 (2d ed.). Under the applicable zoning ordinance plaintiffs had the right to appeal to the Zoning Board of Appeals from any decision of the Chief Building Inspector, and said Board of Appeals is empowered:

> "1. To hear and decide appeals when it is alleged there is error in any order, requirement, decision or determination made by the Chief Building Inspector in the enforcement of this Zoning Resolution.
>
> "2. To hear and decide requests for the Special Exceptions of the Zoning Resolution upon which the Zoning Board of Appeals is required to pass.
>
> "3. To authorize, upon appeal in specific cases, such variances from the terms of the Zoning Resolution as will not be contrary to the public interest where, owing to certain conditions, a literal enforcement of the Zoning Resolution will, in an individual case result in unnecessary hardship, so that the spirit of the Zoning Resolution shall be observed, public safety and welfare secured and substantial justice done. Such variances may

be granted in such individual cases of unnecessary hardship upon a finding by the Zoning Board of Appeals that:

"a. There are extraordinary and exceptional conditions pertaining to the particular property in question because of its size, shape or topography, and

"b. the application of the Resolution to this particular piece of property would create an unnecessary hardship, and

"c. such conditions are peculiar to the particular piece of property involved, and

"d. such conditions are not the result of any actions of the property owner, and

"e. relief, if granted, would not cause substantial detriment to the public good nor impair the purposes or intent of this Resolution, and

"f. no variance may be granted for a use of land or building or structure that is prohibited by this Resolution.

"4. In exercising the above powers, the Zoning Board of Appeals may, in conformity with the provisions of this Resolution, reverse or affirm, wholly or partly, or may modify the order, requirements, decisions or determination from which the appeal is taken and, to that end, shall have all the powers of the Chief Building Inspector from whom the appeal is taken and may issue or direct the issuance of a Building or Occupancy permit."

The foregoing itemization of instances in which the Zoning Board of Appeals might grant variances

from the terms of the Zoning Resolution when read in connection with Article I of the Zoning Resolution stating its objectives:

> ". . . [F]or the purposes of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; of lessening congestion in the streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the overcrowding of land, avoiding both undue concentration and urban sprawl; facilitating the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; protecting property against blight and depreciation; encouraging the most appropriate use of land, buildings and other structures throughout the County; securing economy in government expenditures; and for other purposes, all in accordance with a comprehensive plan for the development of Gwinnett County, the County Commissioners of Gwinnett County do hereby ordain and enact into law the following Articles and Sections of the Zoning Resolution of Gwinnett County, Georgia"

fully answers plaintiffs' contention of lack of standards. *See Atlanta Bowling Center, Inv. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

Granted that what is unquestionably a legislative function, the adoption of a general zoning plan or the zoning of an entire area, becomes, next day, to some extent a judicial function, when one of the affected property owners petitions for relief from the zoning

restriction, certainly the metamorphosis is not complete. What was all legislative one day remains at least quasi-legislative the next day. *See Higginbotham, etc. v. Barrett, et. al.*, . . . F.2d . . (5th Cir. 1973) [No. 72-1526, February 14, 1973], and *Donovan v. Clarke*, 222 F. Supp. 632 (D.C. 1963). The requirements of procedural due process are not procrustean. The Supreme Court said in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 1236 (1961) ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287 (1970). In *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), it was held that in some instances, to-wit: suspension of students from a tax-supported college, procedural due process does not require "a full-dress judicial hearing, with the right to cross-examine witnesses." Under the facts of this case it was not an infirmity of Constitutional proportions for one of the Commissioners to move for an adjournment of two weeks stating his intention to obtain additional studies and consult with the Engineering Department, particularly since no objection was voiced by petitioners at the public hearing at which that announcement of intention was made, and since no effort was made by plaintiffs to obtain information as to the content of such studies or consultation until after the filing of this suit.

Public hearings were held. Plaintiffs attended. At least one of them, South Gwinnett Venture, was accompanied and represented by counsel. The other plaintiff,

whether or not accompanied and represented by counsel, fully participated in the public hearing by presenting evidence.

The Trial Court recognized that plaintiffs were entitled to due process and concluded specifically that they had not been deprived thereof. A hearing was held in the court below at which plaintiffs clarified their contentions and the facts in the case. Thus the court was not acting solely on pleadings but was fully informed. The complaints were dismissed not for lack of jurisdiction but for failure to present any substantial federal question.

As was said in *Confederacion de la Raza Unida v. City of Morgan Hill*, 324 F. Supp. 895 (N.D. Calif. 1971): "the courts have traditionally recognized that zoning matters are of particular concern to, and the province of, the local communities involved and . . . should interfere with the judgment of the local authorities only in the most extreme cases, and under the most extreme circumstances. This attitude goes back at least as far as *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 . . ." And it was said in *Donovan v. Clarke*, *supra*, at 634: "Such a determination (on the petition of a resident for a change in the zoning of his property) is subject to review by the courts, not on the merits of the issues presented, but as to whether the action was justified or was capricious, arbitrary, unreasonable or discriminatory." And this court said in *Higginbotham, etc. v. Barrett, et al.*, *supra*, "The law is settled that the zoning of property, *including* the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without

rational basis." (Emphasis added.) The quoted holding indicates that zoning *in general*, and not just the preparation of comprehensive land use plans is a legislative function.

Even in a criminal trial where the requirements of due process are *strictissimi juris* a perfect trial is not demanded, only a fair trial. *Lutwak v. United States*, 344 U.S. 604, 97 L.Ed. 593 (1953); *United States v. Rhoden*, 433 F.2d 598 (5th Cir. 1972).

The case of *Hot Shoppes, Inc. v. Clouser*, 231 F. Supp. 825 (D.C. 1964), relied upon by appellants is easily distinguishable on two grounds: first, there the Board of Zoning Adjustment violated the detailed regulations governing its own procedure; and, second, the members of the Board conducted an inspection of the premises and failed to set forth the facts which it claimed it discovered as a result of the inspection. The court said "plaintiff did not know that such inspection had taken place, and had no opportunity to question or refute the results of such inspection." That is not the case *sub judice*. Our appellants knew that one Commissioner planned to obtain additional studies and to consult with the Engineering Department prior to the next meeting. It would have been an easy matter for our appellants to have attended the next regular meeting, to have requested that Commissioner to inform them as to exactly what new information, if any, he had obtained through the additional studies and from his consultation with the Engineering Department, and to have requested, if needed or desired, an opportunity to refute the same.

United States Court of Appeals
For the Fifth Circuit

October Term, 1971

No. 71-3420

D. C. Docket No. 14844

South Gwinnett Venture, a partnership composed of South Gwinnett Apartments, Inc. et al.,
Plaintiffs-Appellants,

versus

W. R. (Dudge) Pruitt, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before Wisdom and Ingraham, Circuit Judges and Bootle, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

April 4, 1973

Bootle, District Judge, dissenting.
Issued as Mandate.

APPENDIX C

SOUTH GWINNETT VENTURE, a partnership composed of South Gwinnett Apartments, Inc., et al., Plaintiffs-Appellants,

v.

W. R. (Dudge) PRUITT et al.,
Defendants-Appellees.

ROCKBRIDGE ASSOCIATES, LTD.,
a Georgia Limited Partnership,
Plaintiff-Appellant,

v.

W. R. (Dudge) PRUITT et al.,
Defendants- Appellees.
Nos. 71-3420, 71-3421.

United States Court of Appeals,
Fifth Circuit
Dec. 3, 1973.

Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have these cases re-heard en banc,

It is ordered that these causes shall be reheard by the Court en banc on briefs without oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

SOUTH GWINNETT VENTURE, a Partnership composed of South Gwinnett Apartments, Inc., et al., Plaintiffs-Appellants,

v.

W. R. (Dudge) PRUITT et al., Defendants-Appellees..

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership, Plaintiff-Appellant,

v.

W. R. (Dudge) PRUITT et al., Defendants-Appellees.
Nos. 71-3420, 71-3421.

United States Court of Appeals, Fifth Circuit.
March 14, 1974.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM,* RONEY and GEE, Circuit Judges.

COLEMAN, Circuit Judge.

In 1970, plaintiffs-appellants were the owners of land in Gwinnett County, Georgia, zoned partly residential and partly commercial. They applied to the

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* Judge Ingraham sat as a member of the original panel in this case and thus was a member of the en banc court, *Allen v. Johnson*, 5 Cir., 1968, 391 F.2d 527.

Gwinnett County Planning Commission to have the property rezoned to an apartment classification. The Planning Commission recommended the change, but the Gwinnett County Commissioners denied it. Suit was brought, alleging that the action of the County Commissioners violated equal protection and due process rights guaranteed the plaintiffs by the Fourteenth Amendment; that is, the decision was arbitrary, capricious, and without due process.

After a hearing, the District Court dismissed the complaint on the ground that it presented no substantial federal question, Rockbridge Associates, Ltd. v. Pruitt (N.D.Ga., 1971). 341 F.Supp. 703. The District Court specifically held that it was not the function of federal district courts to serve as zoning appeal boards; that the decision of local zoning authorities is an exercise of judgment legislative in character; and that these decisions are subject to judicial control "only if arbitrary or if interested parties have been denied procedural due process", 341 F.Supp. at 705. In its reported opinion, the District Court held that the County Commissioners had assigned reasons for the denial of the zoning change, that the reasons were consistent with the objectives of the zoning resolution, and that the action taken was not arbitrary because there was evidence to support it.

Upon appeal, a Panel of this Court, by a divided vote, reversed the District Court, South Gwinnett Venture v. Pruitt and Rockbridge Associates, Ltd. v. Pruitt, 5 Cir., 1973, 482 F.2d 389. It was the opinion of the Panel majority that the denial of the rezoning application without a statement of reasons and by recourse to evidence which was not in the record was invalid for

failure to adhere to concepts of minimal due process. The Panel duly noted the opinion of this Court in Higginbotham v. Barrett, 5 Cir. 1973, 473 F.2d 745, which held "that the zoning of property, including the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without a rational basis." The Panel sought to distinguish *Higginbotham*, however, by saying that the adoption of a legislative plan for the entire community differs from a petition for *reclassification* under such a plan. Consideration of rezoning petitions was described as "an exercise of legislative power in a case by case adjudicative setting", therefore, rezoning decisions require an adherence "to concepts of minimal due process", citing Hornsby v. Allen, 5 Cir., 1964, 326 F.2d 605.[1] The judgment of the District Court was reversed and the cause remanded for further proceedings consistent therewith.

Pursuant to an appropriate order the case has been reheard *en banc*. We affirm the judgment of the District Court.

We adhere to the teachings of Higginbotham v. Barrett, 5 Cir., 1973, 473 F.2d 745, in which it was held that local zoning is a quasi-legislative procedure, not subject to federal juridical consideration in the absence of arbitrary action.

Moreover, we see no viable distinction between zoning board functions involved in the adoption of a com-

[1] Whatever vitality remains in *Hornsby* for licensing cases, cf. Atlanta Bowling Center, Inc. v. Allen, 5 Cir., 1968, 389 F.2d 713, its holding will not be extended to zoning cases.

prehensive zoning plan and those exercised in the reclassification of a piece of property under an existing plan, see Shenk v. Zoning Commission of the District of Columbia, 1971, 142 U.S.App.D.C. 267, 440 F.2d 295, cited in *Higginbotham, supra.*

In *Shenk*, the landowners wanted to rezone property from "single family" to "small apartments". Litigation ultimately led to the enunciation of principles to be applied to federal court review of rezoning cases. A zoning commission is a quasi-legislative body. It is not required to make findings of fact or state the reasons for the action taken. Its actions are entitled to a presumption of validity. The only question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare. It necessarily follows that upon a factual showing of arbitrariness there must be some basis in fact and law to justify the zoning action as consistent with reasonableness.

In the cases presently before us, the County Commissioners did state the reasons for refusing the application to rezone, which were the inadequacy of sewage facilities, roads and schools in the area, plus the adverse affect on existing residential areas.

We agree with the District Court that the plaintiffs simply failed to present a substantial federal question and that the complaints should have been dismissed. In reaching this conclusion, we see no constitutional significance in the consultations between the county commissioners and the county engineer or other public officials. We accordingly decline, in the context

of this litigation, to apply the "secret" label to any information thus obtained.

The judgment of the District Court is Affirmed.

WISDOM and INGRAHAM, Circuit Judges (dissenting):

We respectfully dissent for the reasons stated in the panel majority opinion. South Gwinnett Venture v. Pruitt and Rockbridge Associates, Ltd. v. Pruitt, 5 Cir., 1973, 482 F.2d 389.

RONEY, Circuit Judge (specially concurring):

I concur in the result reached by the majority for what may be a slightly different reason. Although I am not sure of the legal difference between arbitrary and capricious conduct and the denial of certain elements of due process, I agree with Judges Wisdom and Ingraham as to a distinction between the necessary action for adoption of a comprehensive zoning plan and the treatment that must be accorded a landowner in consideration of his petition to reclassify a specific tract of land under an existing plan. For want of better words, it seems appropriate to say that in the latter instance, the decision maker must accord the petitioner minimal due process.

As revealed, however, by the opinion of Judge Edenfield in the trial court, the dissenting opinion of Judge Bootle sitting with the panel on our court, and the opinion of Judge Coleman for the en banc court, the plaintiffs were accorded minimal due process in this case.

I concur, therefore, in the dismissal of the cause by the trial court not because plaintiffs were entitled to no more than if a comprehensive plan were being adopted, but because they received the more to which they were entitled.

APPENDIX E

Georgia Code § 2-8402:

"Paragraph I. Home rule for counties.—(a) The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions or regulations relating to its property, affairs and local government for which no provision has been made by general law and which is not inconsistent with this Constitution, or any local law applicable thereto. Any such local law shall remain in force and effect until amended or repealed as provided in subparagraph (b). This, however, shall not restrict the authority of the General Assembly by general law to further define this power or to broaden, limit or otherwise regulate the exercise thereof. The General Assembly shall not pass any local law to repeal, modify or supersede any action taken by a county governing authority under this Section except as authorized under subparagraph (c) hereof.

"(b) Except as provided in subparagraph (c) a county may, as an incident of its home rule power, amend or repeal the local Acts applicable to its governing authority by following either of the procedures, hereinafter set forth:

"1. Such local Acts may be amended or repealed by a resolution or ordinance duly adopted at two regular consecutive meetings of the county governing authority not less than seven nor more than 60 days apart. A notice containing a synopsis of the proposed amendment or repeal shall be published in the official county organ once a week for three weeks within a period of

60 days immediately preceding its final adoption. Such notice shall state that a copy of the proposed amendment or repeal is on file in the office of the clerk of the superior court of the county for the purpose of examination and inspection by the public. The clerk of the superior court shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. No amendment or repeal hereunder shall be valid to change or repeal an amendment adopted pursuant to a referendum as provided in 2 of this subparagraph or to change or repeal a local Act of the General Assembly ratified in a referendum by the electors of such county unless at least 12 months have elapsed after such referendum. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

"2. Amendments to or repeals of such local Acts or ordinances, resolutions or regulations adopted pursuant to subparagraph (a) hereof may be initiated by a petition filed with the ordinary of the county containing, in cases of counties with a population of 5,000 or less, the signatures of at least 25 per cent of the electors registered to vote in the last general election; in cases of counties with a population of more than 5,000 but not more than 50,000, at least 20 per cent of the electors registered to vote in the last general election; and in cases of a county with a population of more than 50,000, at least 10 per cent of the electors registered to vote in the last general election, which petition shall specifically set forth the exact language of the proposed amendment or repeal. The ordinary shall determine the validity of such petition within 60 days of its being filed with the ordinary. In the event the ordinary determines that

such petition is valid, it shall be his duty to issue the call for an election for the purpose of submitting such amendment or repeal to the registered electors of the county for their approval or rejection. Such call shall be issued not less than 10 nor more than 60 days after the date of the filing of the petition. He shall set the date of such election for a day not less than 60 nor more than 90 days after the date of such filing. The ordinary shall cause a notice of the date of said election to be published in the official organ of the county once a week for three weeks immediately preceding such date. Said notice shall also contain a synopsis of the proposed amendment or repeal and shall state that a copy thereof is on file in the office of the ordinary of the county for the purpose of examination and inspection by the public. The ordinary shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. If more than one-half of the votes cast on such question are for approval of the amendment or repeal, it shall become of full force and effect; otherwise it shall be void and of no force and effect. The expense of such election shall be borne by the county and it shall be the duty of the ordinary to hold and conduct such election. Such election shall be held under the same laws and rules and regulations as govern special elections, except as otherwise provided herein. It shall be the duty of the ordinary to canvass the returns and declare and certify the result of the election. It shall be his further duty to certify the result thereof to the Secretary of State in accordance with the provisions of Paragraph 4 of this Section. A referendum on any such amendment or repeal shall not be held more often than once a year. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

"In the event that the ordinary determines that such petition was not valid, he shall cause to be published in explicit detail the reasons why such petition is not valid: Provided, however, that in any proceeding in which the validity of the petition is at issue, the tribunal considering such issue shall not be limited by the reasons assigned. Such publication shall be in the official organ of the county in the weeks immediately following the date on which such petition is declared to be not valid.

"(c) The power granted to counties in subparagraphs (a) and (b) above shall not be construed to extend to the following matters or any other matters which the General Assembly by general law has preempted or may hereafter preempt, but such matters shall be the subject of general law, or the subject of local Acts of the General Assembly to the extent that the enactment of such local Acts is otherwise permitted under this Constitution:

"1. Action affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority.

"2. Action affecting the composition, form, procedure for election or appointment, compensation, and expenses and allowances in the nature of compensation, of the county governing authority.

"3. Action defining any criminal offense or providing for criminal punishment.

"4. Action adopting any form of taxation beyond that authorized by law or by this Constitution.

"5. Action expending the power of regulation over any business activity regulated by the Public Service Commission beyond that authorized by local or general law or by this Constitution.

"6. Action affecting the exercise of the power of eminent domain.

"7. Action affecting any court or the personnel thereof.

"8. Action affecting any public school system.

"(d) The power granted in subparagraphs (a) and (b) of this Paragraph shall not include the power to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power.

"(e) Nothing in this Paragraph shall affect the provisions of Paragraphs 2 and 3 [2-8403, 2-8404] of this Section."

APPENDIX F

THE ZONING RESOLUTION OF GWINNETT COUNTY

Whereas the Municipal-Gwinnett County Planning Commission on April 28, 1970, reviewed the proposed Land Use and Major Thoroughfare Map prepared for it by Hill and Adley Associates, Planning Consultants, dated November, 1962, and unanimously recommended that it be adopted by the Board of Commissioners of Gwinnett County, and

Whereas the Municipal-Gwinnett County Planning Commission on April 28, 1970, reviewed the text of a proposed Zoning Resolution prepared for it by Howard K. Menhinick Director of Planning and Development, Keck and Wood, Inc., dated March 16, 1970, held a duly advertised public hearing thereon on May 26, 1970, and thereafter recommended to the Board of Commissioners of Gwinnett County a text of the Zoning Resolution for adoption,

Therefore, the Board of Commissioners of Gwinnett County on June 2, 1970, adopted the recommended text of the Zoning Resolution with certain changes and on June 9, 1970, incorporated by reference into the Zoning Resolution of Gwinnett County: (1) the existing Zoning Map of Gwinnett County, dated April 28, 1970; (2) the existing Zoning Tax Maps of Gwinnett County, dated April 28, 1970; (3) the Flood District Boundary Line Map, dated April 28, 1970; (4) the Land Use and Major Thoroughfare Map, dated November, 1962; and (5) adopted certain amendments

to the text of the Zoning Resolution, after recommendation by the Municipal-Gwinnett County Planning Commission after a duly advertised public hearing thereon.

Amendments to the text of the Zoning Resolution have been recommended by the Municipal-Gwinnett County Planning Commission to the Board of Commissioners of Gwinnett County, after duly advertised public hearings and the text of the Zoning Resolution has been amended by the Board of Commissioners of Gwinnett County on:

May 24, 1970

December 8, 1970.

ARTICLE XVI
ZONING BOARD OF APPEALS

Section 1600. Zoning Board of Appeals Created. A Zoning Board of Appeals is hereby created.

Section 1601. Membership and Appointment. The Zoning Board of Appeals shall consist of five members residing within the unincorporated portion of Gwinnett County, appointed by the County Commissioners of Gwinnett County. One member of the Zoning Board of Appeals shall be a member of the Planning Commission. No other member of the Zoning Board of Appeals shall hold any other public office in Gwinnett County.

Section 1602. Terms of Office. The term of office of each member of the Zoning Board of Appeals shall

be for three years, or, thereafter until his successor is appointed. However, the terms of the original members of the Zoning Board of Appeals shall be as follows: two shall serve for terms of three years, two for terms of two years and one for a term of one year. Thereafter, each member shall be appointed to serve a term of three years. Members may be reappointed. Any vacancy in the membership shall be filled for the unexpired term in the same manner as the initial appointment.

Members shall be removable for cause by the County Commissioners of Gwinnett County upon written charges and after a public hearing.

Any member of the Zoning Board of Appeals shall be disqualified to act upon a matter in which the member has an interest.

Zoning Board of Appeals members shall be paid $15 per meeting attended as reimbursement for their services and any expenses incurred in connection with their official duties.

Section 1603. Officers. The Zoning Board of Appeals shall elect one of its members, other than the member of the Planning Commission, as Chairman and a second one as Vice-Chairman. The Chairman and Vice-Chairman shall serve for one year or until reelected or until successors are elected. The Zoning Board of Appeals shall appoint a Secretary who may be an employee of the County or of the Planning Commission.

Section 1604. Procedure. The Zoning Board of

Appeals shall adopt rules of procedures. Meetings of the Zoning Board of Appeals shall be at the call of the Chairman and at such other times as the members of the Zoning Board of Appeals may determine. The Chairman or, in his absence, the Vice-Chairman, may administer oaths and compel the attendance of witnesses by subpoena.

The Zoning Board of Appeals shall keep minutes of its proceedings, showing the vote of each member upon each question or, if absent or failing to vote, indicating such fact. The Zoning Board of Appeals shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Zoning Board of Appeals and shall be a public record.

Section 1605. Powers of the Zoning Board of Appeals. The Zoning Board of Appeals shall have the following powers:

1. To hear and decide appeals when it is alleged there is error in any order, requirement, decision or determination made by the Chief Building Inspector in the enforcement of this Zoning Resolution.

2. To hear and decide requests for the Special Exceptions of the Zoning Resolution upon which the Zoning Board of Appeals is required to pass.

3. To authorize, upon appeal in specific cases, such variances from the terms of the Zoning Resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the Zoning Resolution will, in an individual case, result in

unnecessary hardship, so that the spirit of the Zoning Resolution shall be observed, public safety and welfare secured and substantial justice done. Such variances may be granted in such individual cases of unnecessary hardship upon a finding by the Zoning Board of Appeals that:

a. There are extraordinary and exceptional conditions pertaining to the particular property in question because of its size, shape or topography, and
b. the application of the Resolution to this particular piece of property would create an unnecessary hardship, and
c. such conditions are peculiar to the particular piece of property involved, and
d. such conditions are not the result of any actions of the property owner, and
e. relief, if granted, would not cause substantial detriment to the public good nor impair the purposes or intent of this Resolution, and
f. no variance may be granted for a use of land or building or structure that is prohibited by this Resolution.

4. In exercising the above powers, the Zoning Board of Appeals may, in conformity with the provisions of this Resolution, reverse or affirm, wholly or partly, or may modify the order, requirements, decisions or determination from which the appeal is taken and, to that end, shall have all the powers of the Chief Building Inspector from who the appeal is taken and may issue or direct the issuance of a Building or Occupancy permit.

Section 1606. Appeals to the Zoning Board of Appeals. Appeals to the Zoning Board of Appeals may be taken by any person aggrieved or by any official of the County affected by any decision of the Chief Building Inspector. Such appeal shall be taken within fifteen days of filing with the Chief Building Inspector and with the Zoning Board of Appeals a Notice of Appeal specifying the grounds thereof. The Building Inspector shall forthwith transmit to the Zoning Board of Appeals all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all legal proceedings in furtherance of the action appealed from unless the Chief Building Inspector certifies to the Zoning Board of Appeals that, by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life and property. In such a case, proceedings shall not be stayed otherwise than by the Zoning Board of Appeals or by a restraining order that may be granted by a court of record on application on notice to the Chief Buildng Inspector, and on due cause shown.

Section 1607. Required Public Hearings by the Zoning Board of Appeals. Before the Zoning Board of Appeals acts upon an application for a Variance or a Special Exception, it shall hold a public hearing thereon. The notice of the time and place of such hearing shall be published at least 15 days prior to the hearing in the official organ of the County. At the hearing any party may appear in person or by agent or attorney.

In addition, the County shall erect in a conspicuous place on the property involved a sign which shall contain information as to the Variance or Special Excep-

tion applied for and time and place of hearing. Failure to erect and maintain the sign as specified above shall not invalidate the subsequent determination of the Zoning Board of Appeals.

Section 1608. Reapplication to the Zoning Board of Appeals. If an application for a Special Exception or Variance is denied by the Zoning Board of Appeals, a reapplication for such Special Exception or Variance may not be made earlier than 12 months from the date of the original application.

Section 1609. Appeals from Decisions of the Zoning Board of Appeals. Any person or persons severally or jointly aggrieved by any decision of the Zoning Board of Appeals may take an Appeal to the Superior Court. Such an Appeal to the Superior Court shall be the same as an Appeal to the Superior Court from any decision made by the Court of Ordinary and as specified in Chapter 6-2 of the Code of Georgia except, however, that the Appeal may be filed within thirty days from the date of the decision of the Zoning Board of Appeals. Upon failure to file the appeal within thirty days, the decision of the Zoning Board of Appeals shall be final.

On Appeal, the case shall be heard by the Judge of the Superior Court without a jury unless one of the parties files a written demand for a jury trial within thirty days from the filing of the Appeal.

APPENDIX G

A BRIEF HISTORY OF ZONING IN THE UNITED STATES

A. *The Basic Zoning Scheme envisioned by its creators in the 1920's and the Supreme Court in the Euclid case, which conceived of the local zoning authority as a body with only legislative powers, has never been adhered to in practical operation in Georgia or in any other state.*

1. *Historical evolution of the basic zoning plan and the power of judicial review over it.*

The system of zoning as we know it today had its origin in a land-use control movement which sprang up in this country during the period shortly after the turn of the century. While the concept of zoning received only passing attention at the first City Planning Conference in 1909,[1] not long after that several articles began to appear urging cities to adopt some method of regulation to restrict land use.[2] The first comprehensive zoning ordinance was enacted in New York City in 1916. Prior to this time, height restrictions had

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[1] See Ford, The Scope of City Planning in the United States, S. Doc. No. 422, Hearing on City Planning, 61st Cong., 2d Sess. 70 (1910).

[2] See, e.g., an article by Halderman, "The Control of Municipal Development by the 'Zoning System' and Its Application in the United States," appearing in Crawford, Certain Principles of a Uniform City Planning Code, National Conference on City Planning, at 173 (1912); see also a 1913 report entitled "Districting", by the Height of Buildings Commission, reprinted in Commission on Building Districts and Restrictions, Final Report, App. III, 51 (1916).

been enacted and upheld in Boston, Massachusetts in 1909,[3] and use restrictions were upheld in California as early as 1886.[4] After 1916, the movement in favor of zoning began to snowball, and by 1922 it had taken the country by storm, with 20 enabling acts, almost 50 ordinances, and over 100 zone plans in progress.[5] At the same time, it received a significant impetus from the then-Secretary of Commerce Herbert Hoover, who appointed an Advisory Committee on Building Codes and Zoning. The Committee drafted the Standard State Zoning Enabling Act (hereinafter referred to as the SZEA), which was adopted, in whole or in part, by nineteen states in 1925,[6] and which is still the governing statutory law in nearly all jurisdictions today,[7] including Georgia.[8]

The principal architect of the SZEA was Edward M. Bassett of the New York Bar, who was likewise a member of the Hoover Advisory Committee. In May 1920, while serving as Counsel to the Zoning Committee

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[3] *Welch v. Swasey*, 214 U.S. 91 (1909).

[4] *In re Hang Kie*, 69 Cal. 149, 10 Pac. 327 (1886); see also *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714 (1911); see generally, Pomeroy, Zoning: How Far Have We Come? How Far Can We Go? National Conference on Planning 70 (1940).

[5] Review of Planning in the United States, 1920-21, in 11 Nat. Mun. Rev. 27, 32 (1922).

[6] See Haar, Land Use Planning 157 (2d Ed. 1971).

[7] Within a short period after its second publication, see the Standard State Zoning Enabling Act (SZEA) (U.S. Dept. of Commerce rev. ed. 1926), the SZEA had been adopted without material change by all of the states.

[8] Ga. Code §69-801 et seq. (municipalities); Ga. Code §69-1207 et seq. (municipalities and unincorporated county land).

of New York City, Bassett published an article in the National Municipal Review,[9] which provides an interesting insight into the thinking behind the SZEA. Bassett described the "Chaotic Conditions in Unzoned Cities" as follows:

> [t]he lack of regulation stimulated each owner to build in the most hurtful manner.
>
> . . . .
>
> Bright business streets would be invaded by factories. When the factory use began to predominate, customers would leave the localities, rents of stores would drop, and some of the most eligible business centers of cities became partly deserted. Fortunes were lost because business would move away from the locality where it would naturally remain if not forced out. Public stables and more latterly public garages would enter the best business and residential districts. A garage costing $25,000 might cause a loss of $400,000 in the surrounding values. . . . If the first comer was successful in his business, others were attracted, and soon the residential section was shot through with the unnecessary business buildings. . . . No kind of building was immune from harm.[10]

It is easy to see that Bassett was primarily concerned with the diminution in land values suffered by private property owners when an adjacent parcel of land was put to some use which seemed tantamount to

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[9] See Bassett, "Zoning", 9 Nat. Mun. Rev. 315 (Supp. May 1920).

[10] *Id.* at 315-316.

a nuisance. Thus, he conceived of zoning, which is basically a system of regulation by segregation and classification of buildings according to use, as an extension of private property protection, intended to shield *some* but not all landowners, and not as a vehicle for the public (in the sense of *everyone's*) good! Moreover, Bassett's conception of an undesirable neighbor was not limited to conventional notions of nuisance, such as smoking factories, slaughterhouses, and gasoline stations ("garages"); his vision included skyscrapers, and more crucially, apartment houses:

> In residential localities high apartments would build out to the street line and their windows would open on the grounds of private residences. A vacant unrestricted lot in a high-class residential district had a high exploitation value. After such a locality was exploited by a dozen apartment houses, the owners of the private residences would begin to move away. The locality would become depressed and the apartment houses themselves would sometimes find themselves in a blighted district.[11]

Bassett felt that these "chaotic conditions" were due to the inability of the individual to protect himself. Obviously, the "high-class" single-family dwelling unit stood at the apex of his hierarchy of values, and the entire SZEA reflects his fervid concern to protect the land values of wealthier neighbors.

From 1916 to 1926, the advocates of zoning fought a vigorous battle for its judicial recognition. Many

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[11] *Id.*

states considered, and a few adopted,[12] constitutional amendments to permit zoning, but the very real possibility remained that the Supreme Court might interpret this as an unconstitutional use of state power under the Fourteenth Amendment.

The power to zone was finally validated by this Court in the now famous *Euclid* case.[13] It is critical to remember that this Court in *Euclid* did *not* have before it a question involving the application of a zoning ordinance *to a specific piece of property, as occurs in this case.* At stake was simply the constitutional power to "*zone*", and the Court was generally concerned with the generic basis of land use allocation which the Euclid ordinance had adopted. At issue was the "comprehensive plan" of use districts and blanket restrictions *imposed throughout the city* by local government, a scheme which happened to incorporate the hierarchal land use pattern described above. This Court held 6-3 in favor of validity, *after a rehearing* in which it reversed its initial conclusion that zoning was an unconstitutional interference with property.[14]

Even so, this Court did not expressly sanction the system which gave the single family dwelling unit a preferred and protected legal position. Rather, the con-

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[12] A provision authorizing the General Assembly to grant authority to cities to pass zoning and planning laws was first included in the Constitution of Georgia in 1928 (Acts 1927, pp. 127, 128, ratified Nov. 6, 1928). See Ga. Const. art 3, §2-1923 (1945).

[13] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[14] See McCormack, A Law Clerk's Recollections, 46 Colum. L. Rev. 710 (1946).

stitutionality of such ordinances was placed on very different grounds:

> [i]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. [Citations omitted]. 272 U.S. at 395.

That is to say, a zoning ordinance is constitutional only when it serves the *public* interest, and not necessarily if the enactment works merely to protect other *PRIVATE* property rights.

One feature of Euclid's comprehensive plan gave this Court great difficulty; namely, the creation of exclusive residential districts from which apartments were excluded. The problem was that nuisance law had not recognized the differences between single family homes and apartments to the point that it was willing to exclude apartments in single family residential areas.[15] Nonetheless, borrowing heavily from nuisance analogies, it adopted Bassett's view of apartments totally:

> With particular reference to apartment houses it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed

[15] See Mandelker, The Zoning Dilemma, 34 (1971).

> in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of quiet and open spaces for play, enjoyed by those in more favored localities — until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. *Under these circumstances*, apartment houses, . . . come very near to being nuisances. 272 U.S. at 394, 395 (emphasis added).

Note the assumption that all apartments are multistoried monsters, virtually blocking out light and air; that people who live in apartments do not have children who will be menaced by moving cars; and that all parking will be on-street. Quite obviously, the modern trend toward development of small, widely scattered, garden-type apartments was virtually unknown in 1926.

Still the power to zone was upheld, and the scope of review of *comprehensive* plans and ordinances was sharply narrowed by the Court's adoption of a presumption of constitutionality:

> If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. 272 U.S. at 388.

The only other significant Court pronouncement on zoning to this date came shortly afterward in *Nectow v. City of Cambridge*,[16] decided in 1928. Although the ordinance in question was of the same general character seen in *Euclid*, the attack in *Nectow* was *NOT based on the overall validity of the measure itself*, which was conceded to be constitutional within the meaning of *Euclid*, but rather *as it was applied to the specific piece of property owned by the plaintiffs.* The appeal was from a Massachusetts decision upholding an ordinance which failed to take into account sensitive differences between the plaintiffs' land and others' nearby. This Court took jurisdiction, and *reviewed* the decision *on the merits*, holding that *the ORDINANCE WAS UNCONSTITUTIONAL AS APPLIED* because it did not bear a substantial relation to the public health, safety, welfare and morals.[17] Plainly, the Court felt the situation in *Nectow* was one which was clearly proper for judicial review, thus distinguishing the case which makes a broad attack on the constitutionality of an ordinance as a whole from the one where the claim is that the ordinance is unconstitutional as applied. It is equally clear that the Court intended only the former class of cases to be substantially cloaked from judicial review by the presumption of constitutionality; in the latter instances courts not only would, but should, scru-

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[16] 277 U.S. 183 (1928).
[17] See 277 U.S. at 188.

tinize challenges to decisions made by the local authority as they applied to individual parcels of land.

After the *Euclid* decision, the SZEA was enacted in practically every state in the union. Its familiar framework included a grant of power provision for use districts; a body called the Zoning Commission, which was to lay out broad rules, and another called the Board of Adjustment, to take care of any wrinkles in the plan; three procedures for change — two administrative, and one presumptively legislative; and finally, enforcement procedures and remedies.[18] In 1928, Georgia approved a constitutional amendment giving its cities and counties the power to zone, and later enacted two statutes spelling out the plan in greater detail — one for municipalities, see Ga. Code Ann. § 69-301 et seq., and another for the unincorporated area of counties, see Ga. Code Ann. § 69-1207 et seq. In addition the 1966 amendment to the Georgia Constitution, known as the "Home Rule for Counties" Amendment (Ga. Code Ann. § 2-8402 *et seq.*) specifically empowers the governing authority of each county "to enact for unincorporated areas appropriate planning and zoning ordinances for public safety, historic, health, business, residential, and recreational purposes." Ga. Code Ann. § 2-8404. See Johnson v. Hicks, 225 Ga. 576, 580 (1969).

2. *How the plan actually functions; or "coping with the dynamics of real life."*

The SZEA ordinances, such as the Zoning Reso-

[18] See Standard State Zoning Enabling Act (SZEA), (U.S. Dept. of Commerce rev. ed. 1926).

lution of Gwinnett County, envision a plan which is designed to give property owners a maximum amount of predictability and notice concerning land uses in the future. The central idea behind the act is a plan for the end-state of the community. Each community is to set down in minute detail rules for the "nth stage" of development into the future. Such a plan should be so detailed and comprehensive that the rules are practically self-administering: the finished blueprint should be predictable and basically static.

The notion of a detailed "comprehensive plan", with self-administering rules stated in advance of development has for a number of reasons turned out in reality to be a total impossibility. First, *the local zoning authority cannot force the assembly of land.* Thus, no matter how elaborately it maps out a plan for the future, ultimately developers in the private sector are left with the decision whether to build *OR NOT.* The governing body might think a particular area is suited for building apartments, but if no one in the market place thinks so, or if the present owner refuses to sell the tract, *no apartments will ever be built.* The irony is that *the plan actually works against development;* both, because its *creation of artificial scarcities* encourage favored landowners *not* to sell in the hope that the value will continue to appreciate, and also, because the more detailed the plan gets *the less attractive it becomes* to the prospective developer who will not build if there are too many restrictions.

A second and corollary reason that the plan has failed is that *the government cannot prevent the disassembly of land.* Property owners are still free to divide their land by will, leaving odd parcels to de-

scendants, thereby corroding the grand scheme envisaged perhaps years hence — perhaps tomorrow.

A third reason of enormous significance is that *zoning has in fact evolved into a quota system for various land uses,* which overtly operates to deprive one landowner of permitted development rights by allowing another to preempt him. This completely contradicts the notion that zoning involves a plan to perpetuity restricting land only in the interest of the *public* health, safety, welfare and morals, and indicates in reality that zoning has in fact degenerated from a plan for the future *INTO A SYSTEM OF RULES FOR HANDING OUT PRIVILEGES;* it is a system which creates open space and makes people pay for it. It has become a *presently* operating plan — no *re*zoning — no development.

The problem is that communities enacting zoning ordinances have assumed that the plan must consist of detailed blueprints with all the buildings set out instead of merely a set of rules for constructing a city in the future. The 1920ish notion that a legislative body should set forth all the rules into the indefinite future in exacting detail with no chance for the intervention or further exercise of discretion is, upon reflection, wrong. As Professor Krasnowiecki says, "It is a concept of land use control that is not consonant with reality."[19]

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[19] See "Kras: Father of the PUD in the U.S.A.", University of Pennsylvania Law Alumni Journal, p. 7 (Fall 1971). Other fallacies which Krasnowiecki sees inherent in the old zoning notion are (1) communities get "totally swamped" because their 20-year projections of planned growth can be arbitrarily telescoped into a span as short as two years,

Now in fact the Georgia courts have come to realize that the comprehensive plan cannot be static. The *Kirkpatrick* court, *supra*, recognized this when it held that the power to zone included the power to rezone. Similarly, in *Vulcan Materials Co. v. Griffith*, 215 Ga. 811, 114 S.E.2d 29 (1960), overruling *Neal v. Atlanta*, 212 Ga. 687, 94 S.E.2d 867 (1956), the court held that the laws of Georgia specifically authorize "spot zoning"; that is, the process of lifting out one unit or one particular piece of property from a zoned area and rezoning it for a different use. These decisions by the Georgia courts serve to reconcile the gap between the theory and practice of zoning, as discussed earlier, by allowing the system to operate with greater flexibility, and *they vigorously dispute the idea that such judgments are in any way "legislative" in character, and insist that such step-by-step activities involve highly discretionary judgments concerning INDIVIDUAL property owners*, which must be safeguarded by the panoply of due process guaranteed to citizens by the 14th Amendment to the U.S. Constitution.

To some extent, the zoning ordinance itself recognizes the need for change as well. Article XVII of the Gwinnett County Zoning Resolution provides for amendments of zoning provisions, and in doing so makes a grant of *administrative* power to the zoning commission when it stipulates that:

"This Resolution . . . *may* be amended from time

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with development occurring "all at once", and (2) the concept deals only with the physical control of land and does not admit to dealing with developers (or owners) on a *personal* basis, an idea which is utterly belied by reality.

to time. . . ." The ordinance tries to insulate these obviously *discretionary* activities from judicial review by giving the local legislative body the power to decide, but such a maneuver cannot conceal the fact that *THE FUNCTION SERVED IS ESSENTIALLY JUDICIAL* in nature and very nearly identical to the purpose served by the Board of Appeals, which is clearly an administrative body.

The whole problem with the amendment mechanism is that it opens up a big hole in the scheme, and completely negates the idea that it is a plan for the future governed by broad impersonal rules. Not only does it break down the concept of predictability, it sets up an impossible dilemma, because *a constantly changing plan is tantamount to no plan at all.*

In response to this quandry, zoning commissions have developed two techniques to try to solve the problem. In a small number of communities, all land has been zoned "above the market"; that is to say, the commission has enacted ordinances with few restrictions which mean that a wide variety of uses is allowed everywhere, and developers are free to develop land within certain broad limitations. The commission exercises *control* over the development plan by rezoning individual parcels upward just before the developer starts to build, if it does not happen to like what he has in mind. Courts have traditionally taken a dim view of this technique of slamming the door on an applicant. For example, in *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965), the zoning authority allowed a developer to proceed, first requesting preliminary site plans, then a grading permit, then more specific plans, then a building permit

and so on. After allowing him to proceed several months, it suddenly passed an ordinance rezoning *only his property* in order to preclude development altogether. The Pennsylvania court predictably invalidated the zoning ordinance upon finding it to be special legislation, discriminatory, arbitrary, and unreasonable. See also, *Andgar Associates, Inc. v. Board of Zoning Appeals*, 30 A.D. 2d 672, 291 N.Y.S.2d 991 (1968); *People v. County Cook*, 50 Ill. App. 2d 436, 206 N.E.2d 436 (1965).

The judicial trend seen in *Peternel* has forced the vast majority of zoning commissions to resort to the second technique: zoning just *below* the level of probable development. This forces a property owner into a somewhat more difficult legal position than the *Peternel* litigants faced; but as a control technique it operates in much the same way as the procedure condemned by the Pennsylvania court in that case. Here, the zoning ordinance is made so restrictive that almost no one would want to develop under the stated rules; it is a system based on an extremely comprehensive plan which actually regulates at a level just below the level at which development can occur. Therefore, development is only *really* permitted through all kinds of changes — variances, special exceptions, and amendments. *The result is that most development has occurred not in accordance with pre-established rules, but rather with change at the threshold of development.* In an important study recently released, entitled "Building The American City: Report of the National Commission on Urban Problems to the Congress and to the President of the United States", House Document No. 91-34 91st Congress, 1st Session (Paul H. Douglas, Chairman), a blue-rib-

bon Presidential Commission describes the situation as follows:

> The "wait and see" approach to regulations represents a change in the administrative procedure applied to proposed development. In place of the older "self-executing" regulations, the approach contemplates *discretionary* public review of development proposals shortly before development occurs. In essence, the traditional administrative process in zoning is giving way to the more general standards and administrative discretion traditional in subdivision regulations. *The developer proposes, and the municipality disposes.* Sometimes the process is guided by useful plans and standards, but often not. *Increasing reliance on discretionary review* may well represent a more fundamental change in land use regulations than any changes in substantive requirements. *Building The American City* at 206. (emphasis added)

Typically, the developer comes with a proposal which, *in the absence of any standards* (in fact the situation in Gwinnett County), may very likely be decided arbitrarily according to the whim and taste of the local zoning authority. This, of course, is not consistent with the notion of "legislative" action — the amendment *does not* apply to all. Amendments are virtually always a response to a solicited proposal pertaining to an individual piece of property. Administered in this way, zoning amendments are handled by the local governing authority on a case-by-case basis considering requests from property owners seeking relief from existing, overly restrictive zoning ordinances

which rarely if ever bear any proven relation to the health, safety, welfare or morals of the community.

Thus an amendment is just like a variance or a special exception except that it is issued by the local governing authority instead of the Board of Appeals.

Amendments now occur more or less instantaneously, giving short notice, and as such, represent *the complete antithesis of the theory of a set of impersonal rules disposing of everyone's welfare impartially.*

The problem is, this evolution has gone on largely unnoticed by a substantial number of courts, who continue to treat the myths of the SZEA as if they were still operative.

The chief myth is the idea that a local zoning authority is a *legislative body* which merely enacts broad, impersonal, self-executing rules. The reality of the situation described above utterly belies this concept. Even Bassett was afraid of what courts might think of case-by-case "piecemeal" zoning:

> Comprehensive zoning of an entire city is strong because localities substantially similarly situated are treated alike. Piecemeal zoning is weak because it is discriminatory. Piecemeal zoning is apt to produce test cases full of danger because, for instance, an owner of a vacant lot is prevented from building a garage in one residential locality when a similar owner in a similar locality ten blocks away is allowed to build a garage. *This is discriminatory on its face and is likely to incur the criticism of the courts.*[20]

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[20] Bassett, *supra* at 320.

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SUPREME COURT, U. S.

JUL 10 1974

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1861

SOUTH GWINNETT VENTURE, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green,
Petitioner,

vs.

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually, and as Chief Building Inspector of Gwinnett County,
Respondents.

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership,
Petitioner,

vs.

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Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF CASE

In addition to the recitals made by Petitioners it should be noted that subsequent to the first decision by the Fifth Circuit Court of Appeals, *South Gwinnett Venture et al v. Pruitt, et al.*

5 cir., 482 F. 2d 389, the Respondents herein themselves petitioned this Honorable Court for Writ of Certiorari, No. 72-1704, October Term, 1972. This petition was dismissed by stipulation subsequent to the en banc decision of the Fifth Circuit Court of Appeals, *South Gwinnett Venture, et al v. Pruitt, et al*, 5 Cir., 491 F.2d 5.

Moreover, while joining as Applicants for certiorari the case made by the respective petitioners is not identical. The petitioner South Gwinnett Venture made no allegation that secret information had been utilized against it by the Gwinnett County Commissioners; only Rockbridge Associates, Ltd. made such assertion. The Petitioners, therefore, are not similarly situated.

QUESTIONS PRESENTED

Respondents submit that the questions presented are:

1. Whether discretionary judgments made by a local zoning authority when considering on a case-by-case basis requests from individual property owners seeking amendments to zoning ordinances and relief from existing restrictions as they apply to specific parcels of land are proper subjects for the exercise of Federal jurisdiction?

2. Whether, assuming the foregoing question is answered in the affirmative, such individual property owners, as a condition precedent to invoking Federal Jurisdiction, must first exhaust administrative remedies afforded and State judicial processes provided by the State?

REASONS FOR DENYING THE WRIT

I. Petitioners are seeking the extension of Federal jurisdiction into a purely local area so as to make United States District Courts serve as "zoning appeal boards". This would be contrary to the principles announced in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, and *Gorieb v. Fox*, 274 U. S. 603, 47 S. Ct. 635, 71 L. Ed. 1228.

II. The differentiation sought by Petitioners between "the adoption of a legislative plan for the entire community" and a "case-by-case adjudicative plan" would create a new basis for the exercise of Federal Jurisdiction, and thereby flood the Federal Courts with actions seeking to review such decisions. This Honorable Court has never recognized such distinction but, on the contrary, has considered decisions of local zoning authorities to be legislative in character. *Zahn v. Board of Public Works, Etc.*, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074.

III. The Petitioners, as unsuccessful applicants for re-zoning, applied directly to the District Court for relief by-passing the Board of Zoning Appeals and without seeking redress in the Georgia Courts.

These reasons will be discussed seriatim.

I

The District Courts Should Not Serve as Zoning Appeals Boards.

In its opinion dismissing the complaints (Appendix A-3) the District Court pointed out that the exercise of jurisdiction would cause District Courts to serve as "zoning appeal boards". In so stating the District Court was being realistic.

That such end result was never intended by this Court is inherent in the language used in the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

And in *Gorieb v. Fox*, 274 U. S. 603, 47 S. Ct. 675, 71 L. Ed. 1228, it was stated:

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable."

Village of Belle Terre, et al. v. Boraas, et al., No. 73-191, October Term, 1973, decided April 1, 1974. *42 Law Week 4475*, restated these principles. We quote (p. 4477):

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' (quoting *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415) and bears 'a rational relationship to a [permissible] state objective.' *Reed v. Reed*, 404 U. S. 71, 76."[1]
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> * * * * * * *
>
> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a

[1] The dissent of Mr. Justice Marshall, while noting a First Amendment objection to the local ordinance, nonetheless states: "Our role is not and should not be to sit as a zoning board of appeals."

given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.*[2] The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."

II

The Distinction Sought by Petitioners Between Comprehensive Zoning Plans and Case-by-Case Determinations Is Not Sustainable.

That a local zoning authority acts in a legislative, and not a judicial capacity, has long been recognized. In *Zahn v. Board of Public Works, Etc.*, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074, the following language appears:

> "The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is *fairly debatable*. In such circumstances the settled rule of this Court is that it will not substitute its judgment for that of *the legislative body* charged with the primary duty and responsibility of determining the question." [Emphasis supplied.]

The differentiation sought by Petitioners between zoning for an entire community and rezoning of property of individual owners on a case-by-case basis has no support in the decided

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[2] 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27.

cases. In either instance the Courts recognized exercise of a legislative as opposed to a judicial function.

Diedrich v. Zoning Commission of the District of Columbia (App.D.C.), 393 F.2d 666, is illustrative. A *comprehensive* map was promulgated in 1958. Seven years later, on November 27, 1965, the appellant-owners applied to the Zoning Commission for an amendment to the map, i.e., *rezoning* of their property. Said the Court:

> "The functions of the Commission in preparing and promulgating plans and maps are obviously exercises of judgment legislative in character and are subject to judicial control only if arbitrary or capricious. Since we cannot say that the challenged action was devoid of evidentiary support or irrational, we are obliged to affirm."

(a)

Petitioner Rockbridge Associates, Ltd. was not denied a Fourteenth Amendment protected right.

Respondent begs leave at this point to quote in extenso from the dissent set forth in the first decision by the Fifth Circuit Court of Appeals, *South Gwinnett Venture et al. v. Pruitt, et al.*, 5 Cir., 482 F.2d 389:

> "The majority opinion groups these two cases together and over-reacts, I think, to the contention of one of the plaintiffs that as to it the County Commissioners in star chamber fashion used non-record secret evidence. I, naturally, have examined that charge carefully. First, it must be noted that only Rockbridge Associates, Ltd. makes this contention. South Gwinnett Venture's case was considered by the Commissioners on November 24, 1970, and again on December 1, 1970, and *there is no contention that any secret evidence was used in the consideration of that case.*

> The Rockbridge case was considered by the Commissioners earlier on August 25, 1970 and September 9, 1970, and it is in connection with these earlier hearings that Rockbridge claims the use of secret evidence. *Secondly, I think this charge is unsubstantiated.* What happened is this: at the August 25, 1970 hearing one of the Commissioners moved to 'table the decision for two weeks so that he could obtain additional studies and consult with the Engineering Department.' *This does not sound star chamberish.* His intentions were announced in open meeting. The postponement was for two weeks. The Engineering Department of Gwinnett County is probably not so large that plaintiffs could not have ascertained whatever information it furnished the Commissioners had they so desired. Nor does any reason appear why they did not inquire at the resumed hearing on September 9, 1970, as to what additional studies, if any, the Commissioners had obtained. Rockbridge argues that the Commissioners have refused to disclose the contents of their conversation with the Engineering Department and the additional studies. *Nothing in the record substantiates this argument.* Nor was there any request by plaintiffs for any more complete or detailed findings of fact by the Commissioners. *All this suggests that plaintiffs' desire to make a federal case exceded their fear of deprivation of due process.*" [Emphasis supplied.]

From the foregoing it is obvious South Gwinnett Venture achieves a tactical advantage if its case is equated with that of Rockbridge Associates, Ltd. for decisional purposes. Additionally, that the "star chamber" allegations made by Rockbridge Associates, Ltd. are lacking in substance.

Assuming, arguendo, however, that so called "secret evidence" was to some extent utilized by the Gwinnett County Commission, this is not inconsistent with the legislative process

nor does it deny Fourteenth Amendment protected rights. Historically, legislative bodies have utilized reports, studies, charts, scientific texts, etc., from outside sources during their deliberations. As pointed out in *Garrity v. District of Columbia* (App.D.C.), 86 F.2d 207, 215

> "And it is well settled that a zoning commission acts in a legislative capacity. *Zahn v. Board of Public Works*, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074. It is not, therefore, *any more than a legislative committee would be*, subject to the rules of procedure which govern the conduct of judicial hearings. Only if its action is palpably arbitrary can a court set it aside."

Gerstenfeld v. Jett (App.D.C.), 374 F.2d 333—a rezoning case—affords an additional example. We quote (p. 335):

> "Appellant also claims that in the reclassification determination the Zoning Commission illegally considered the recommendation of the National Planning Commission which was outside the hearing record and that its final determination was arbitrary, capricious, and unsupported by substantial evidence. It appears that the recommendation of the Planning Commission was available at the hearing, and that its final recommendation, sent several months later, was a duplication of what was originally available. Further, the Zoning Commission, operating in a quasi-legislative capacity, is not required to limit its decision making to evidence within the hearing record. (cits.)"

And more recently the Supreme Court of Georgia in *Barton v. Atkinson*, 228 Ga. 733, 187 S.E.2d 835, stated that the reading of reports from local boards of education, public works departments, and public health departments "at each public hearing is not of the essence."

(b)

Neither due process nor equal protection require that petitioners be afforded the most profitable utilization of their property.

Petitioners' subtle appeals to emotion as to the cherished right of private ownership of property in the United States is not only here misplaced but late in point of time. The police power is, and has long since been recognized to be, a condition or limitation upon the right to hold, use, and enjoy property. In *Goldblatt v. Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 989, 8 L.Ed.2d 130 this Court stated:

> "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. (cits.)"

Accord—*City of St. Paul v. Chicago, St. Paul, M. and O. Ry.*, 413 F.2d 762, collating cases.

Attention is invited to the holding in *Lewis v. District of Columbia* (App.D.C.), 190 F.2d 25, 27:

> "In considering the propriety of any zoning order it must be remembered that zoning, by definition, requires that a boundary be drawn at some point, even though practical conditions may not change abruptly as the line is crossed. 'Some must suffer by the establishment of any territorial boundaries.' *L'Hote v. New Orleans*, 177 U.S. 587, 597, 20 S.Ct. 788, 792, 44 L.Ed. 899. That is the price to be paid in order that we may have effective zoning. The necessity and desirability of zoning and city planning can no longer be subject to debate."[3]

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[3] Cf. Footnote 5, *Village of Belle Terre et al. v. Boraas, et al.*, supra, 42 Law Week 4477, quoting dissent of Mr. Justice Holmes in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41.

III

Petitioners Did Not Exhaust Available Administrative and State Judicial Remedies.

Petitioners in seeking to raise a substantial Federal question ignored the concept of primary jurisdiction.

In *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed 2d 126, this Court equated primary jurisdiction with exhaustion of administrative remedies. In so doing it noted:

> " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course."

Brawner Building, Inc. v. Shehyn, et al. (App.D.C.), 442 F.2d 847, applied this holding to zoning. In vacating the grant of a permanent injunction and remanding the case for further proceedings, the Court stated (p. 856):

> "A litigant entitled to permanent relief under the zoning regulations may be compelled to pursue his administrative remedies rather than be able either to resort to self-help or to seek an initial determination."

The Court cited in support of its action numerous decisions of this Court including *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338, 83 S.Ct. 379, 383, 9 L.Ed.2d 350; *United States v. Western Pacific Railroad*, 352 U.S. 59, 63-64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126; *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69, 91 S.Ct. 203, 208, 27 L.Ed.2d 203.

Petitioners, as found by the District Court, made no case under the Fourteenth Amendment. Historically, the Fifth Cir-

cuit Court of Appeals, has required a strong showing that a substantial Federal question existed. *Central Bank and Trust Company v. City of Miami Beach*, 392 F.2d 549, 551 contains the following language:

> "The federal issue was insubstantial—if not frivolous. This Court therefore will not pass on state issues dragged in through the back door by the doctrine of pendent jurisdiction." (cits.)

The en banc decision, complained of by Petitioners, accords with the foregoing.

The line of authority urged upon the court by Petitioners includes no decisions dealing with zoning. *Morgan v. United States*, 304 U.S. 1, was concerned with a hearing pursuant to a Federal statute. The remaining decisions cited by Petitioners involved ratemaking.

That such decisions are easily distinguishable is clearly demonstrated by the following quotation from *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 303:

> "We have pointed out elsewhere that under the statute of Ohio no provision is made for a review of the Order of the Commission by a separate or independent suit. (cits.) A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling."

Obviously if, as here, an administrative or state afforded judicial remedy had been available a different result would have been reached.

Cf. *James v. Valtieira*, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed. 2d 678.

CONCLUSION

In *Central Bank and Trust Company v. City of Miami Beach*, 5 Cir., 392 F.2d 549, 551, the Fifth Circuit Court of Appeals stated (550-551):

> "Property owners attacking the validity of zoning laws have a high wall to surmount."

If certiorari is granted and the en banc decision of the Fifth Circuit Court of Appeals overturned such property owners will have no wall to surmount. Every denial of an application for re-zoning will immediately become a federal case.

Respectfully submitted

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